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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-6519

NAHUM ZACKAI, Appellant,

v.

BOARD OF GOVERNORS OF STATE COLLEGES AND UNIVERSITIES FOR CHICAGO STATE UNIVERSITY, Appellee.

ON APPEAL FROM THE SUPREME COURT OF ILLINOIS

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The appellant, Dr. Nahum Zackai, asks leave to file the attached Jurisdictional Statement without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53.

The appellant's affidavit in support of this motion is attached hereto.

Gary H. Palm
Counsel for Appellant

Gary H. Palm
Edwin F. Mandel Legal Aid Clinic
6020 South University Avenue
Chicago, Illinois 60637
(312) 324-5181

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AFFIDAVIT

I, Nahum Zackai, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees:

1. I am the appellant in the above-entitled case.

2. Because of my poverty I am unable to pay the costs of said cause.

3. I am unable to give security for the same.

4. I believe that I am entitled to the redress I seek in said case.

5. The nature of said cause is briefly stated as follows:

The Illinois Supreme Court ruled that the Illinois Fair Employment Practices Commission lacks jurisdiction over my charge of employment discrimination because of its failure to issue a complaint within the statutory time period. The present proceeding was commenced as an appeal, as permitted by 28 U.S.C. §1257(2), on the ground that the decision violates the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution.

Nahum Zackai

Nahum Zackai

Subscribed and Sworn to
before me this 30th day
of April, 1980.

Sally Mendoza
Notary Public

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JURISDICTIONAL STATEMENT

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Dated: May 1, 1980

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JURISDICTIONAL STATEMENT

Dr. Nahum Zackai, the appellant, appeals from the issuance of a writ of prohibition by the Supreme Court of Illinois on November 21, 1979. The Petition for Rehearing was denied on February 1, 1980. This jurisdictional statement is submitted to show that jurisdiction lies for this appeal and that a substantial issue is raised. The issuance of the writ of prohibition violates appellant's Fourteenth Amendment rights to due process of law and the equal protection of the laws.

OPINIONS BELOW

The opinion of the Supreme Court of Illinois, which appears in the appendix hereto, p.1a, is reported at 78 Ill.2d 143, 399 N.E.2d 590 (1979). The orders entered by Administrative Law Judge Patricia A. Patton are not reported. The order denying appellee's motion to dismiss dated January 31, 1979 is reproduced in the appendix,

p.1d, infra. The order denying appellee's motion for reconsideration dated March 13, 1979 is also reproduced in the appendix, p.1e, infra.

JURISDICTION

The judgment of the Supreme Court of Illinois, granting the original writ of prohibition and terminating appellant's pending action before the Illinois Fair Employment Practices Commission was entered on November 21, 1979. See p.1a, infra. A petition for rehearing was submitted by Dr. Zackai and denied on February 1, 1980.

The notice of appeal to this Court was duly filed in the Supreme Court of Illinois on May 1, 1980. This appeal is being docketed in this Court within 90 days from the denial of rehearing below.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2).

QUESTIONS PRESENTED

1. Does the termination of employment discrimination actions under the Illinois Fair Employment Practices Act solely because the Fair Employment Practices Commission failed to complete its investigation within 180 days violate equal protection because it is an irrational classification?

2. Does due process attach to employment discrimination actions filed under the Illinois Fair Employment Practices Act?

3. Is an individualized decision by the Fair Employment Practices Commission on the merits of each charge of employment discrimination required by due process and equal protection?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fourteenth Amendment, United States Constitution, §1:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ill. Rev. Stat. ch. 48, §§851, 852(d), 853(a), 856, 856.07, 858, 858.01(a), 860 (1975) are reproduced in the appendix hereto, pp.1-4f, infra.

Ill. Rev. Stat., ch. 48, §858.01a (added by Public Act 80-1455, Section 1, effective September 16, 1978) is reproduced in the appendix hereto, p.4f, infra.

STATEMENT OF THE CASE

On November 30, 1976, appellant, Dr. Nahum Zackai, filed a charge with the Illinois Fair Employment Practices Commission (hereinafter "Commission"), pursuant to Ill. Rev. Stat. ch. 48, §858 (1975), alleging that Chicago State University had discriminated against him because of a physical handicap, his blindness. Chicago State University is part of the Illinois Board of Governors (hereinafter "Board of Governors") system of state colleges and universities which is the appellee in the present action.

In May, 1976, Dr. Zackai suffered a hemorrhage behind his eyes, and lost most of his sight. He was informed by his physician that he was legally blind. At that time, appellant was a sixty-six year old male and had been employed as a tenured professor for fifteen years by Chicago State University. Unaware of the rehabilitative resources available to the visually

handicapped, Dr. Zackai felt compelled to resign and submitted a letter dated May 12, 1976 to Dr. Allan DeGiulio, Vice President for Academic Affairs at Chicago State University, requesting an early retirement effective June 30, 1976. Although receipt of the request was acknowledged by Dr. DeGiulio, no further action was taken.

During the following weeks, Dr. Zackai spoke with professionals who work with the visually handicapped and learned that with adjustments he would be able to continue his teaching career. Therefore, Dr. Zackai wrote a letter to Dr. DeGiulio on June 17, 1976, withdrawing his retirement request. As of June 17, 1976, Board of Governors had not acted upon Dr. Zackai's request for an early retirement; nevertheless, Dr. DeGiulio refused to withdraw the May 12 retirement request and instead informed Dr. Zackai that the request could not be withdrawn. Finally, on July 29, 1976, more than a month after Dr. Zackai sought to withdraw his request, the Board of Governors officially retired him. Dr. Zackai claimed that the Board of Governors discriminated against him since others were allowed to withdraw early retirement requests.

The Illinois Fair Employment Practices Act provides:

> Unfair employment practices.)
>
> It is an unfair employment practice:
>
> (a) For any employer, because of the race, color, religion, sex, national origin, ancestry or physical or mental handicap unrelated to ability of an individual, or an unfavorable discharge from military service, to refuse to hire, to segregate, or otherwise to discrimin-

> ate against such individual with respect to hire, selection and training for apprenticeship in any trade or craft, tenure, terms or conditions of employment.... Ill. Rev. Stat. ch. 48, §853(a) (1975).

The Commission is given the power to "issue, receive, investigate, and determine charges" of violations of the Fair Employment Practices Act. Ill. Rev. Stat. ch. 48, §856.07 (1975). The Fair Employment Practices Act requires that charges be filed within 180 days of the occurrence of an unfair employment practice. Ill. Rev. Stat. ch. 48, §858 (1975). By filing his charge on November 30, 1976, Dr. Zackai fulfilled this requirement.

After a charge has been filed with the Commission, the Fair Employment Practices Act requires that it conduct its own investigation into the facts surrounding the charge. Ill. Rev. Stat. ch. 48, §858 (1975). If the Commission concludes after its investigation that there is a lack of "substantial evidence" to support the charge, then it is directed to dismiss the charge. Id. If it is determined that substantial evidence exists to support the charge, then the Commission is directed to attempt conciliation between the parties to the charge in an effort to reach settlement. Id. If conciliation is unsuccessful, then the Commission issues a complaint and a public hearing is scheduled. Ill. Rev. Stat. ch. 48, §858.01(a) (1975). The Fair Employment Practices Act states that:

> Whenever such a charge of an unfair employment practice has been properly filed, the Commission, within 180 days thereof or within any extension of that 180 day period agreed to in writing by all parties and approved by a member of the Commission, shall either issue and serve a complaint in the manner and form set forth in this Section or shall order that no complaint

be issued. Any such order shall be duly served upon both the complainant and the respondent. Ill. Rev. Stat. ch. 48, §858.01(a) (1975).

On November 30, 1976, at the time Dr. Zackai's charge was filed, the Commission had a backlog of approximately two thousand cases. The Commission did not begin its statutorily required investigation (Ill. Rev. Stat. ch. 48, §858 (1975)) until February, 1977. On May 30, 1977, the 180 day period in which the Commission is directed to investigate, conciliate, and either dismiss the charge or file a complaint pursuant to Ill. Rev. Stat. ch. 48, §858.01(a) (1975) elapsed.

On April 4, 1978, the Commission notified both the Board of Governors and Dr. Zackai of its findings that there was substantial evidence of discrimination. Attempts at conciliation were unsuccessful, and a complaint was issued on June 22, 1978.

On June 27, 1978, the Board of Governors filed a motion to dismiss the complaint.

In its motion, the Board of Governors contended that the Commission lacked subject matter jurisdiction over Dr. Zackai's claim because it had not issued the complaint within 180 days after he had filed his charge. Relying on Springfield-Sangamon County Regional Plan Commission v. Fair Employment Practices Commission, 71 Ill.2d 61, 373 N.E.2d 1307 (1978), the Board of Governors argued that the 180 day time period contained in §858.01 (a) was mandatory, depriving the Commission of jurisdiction over any complaint issued later. In responding to the Motion to Dismiss, appellant distinguished Springfield-Sangamon, supra, on the ground that in that

case, the respondents to the charge had not been named or joined as parties until long after the charge had been filed and, thus, had suffered prejudice as a consequence of the delay in filing a charge. Appellant relied on Moss-American, Inc. v. Fair Employment Practices Commission, 22 Ill.App.3d 248, 317 N.E.2d 343 (1974), which the court found to be inapposite to the facts of Springfield-Sangamon, supra. In Moss-American, an Illinois Appellate Court declined to dismiss a complaint since no prejudice was shown.

On April 6, 1979, the Board of Governors filed a motion for leave to file a petition for an original writ of prohibition with the Illinois Supreme Court, which was granted on April 16, 1979. Thereafter, both the Commission and Dr. Zackai filed motions to dismiss the petition, which the Illinois Supreme Court ordered to be taken with the case. In support of its petition, the Board of Governors relied on Springfield-Sangamon, supra, and argued that the 180 day provision was mandatory and that the Commission lacked subject matter jurisdiction over complaints issued after the expiration of the 180 day period. Dr. Zackai relied on Moss-American, supra, which had been distinguished by the Illinois Supreme Court in Springfield-Sangamon, supra, to support his position that the Commission had not lost jurisdiction over his complaint and the provision should be construed as directory in nature.

In its November 21, 1979 decision, the Illinois Supreme Court rejected Dr. Zackai's statutory argument. The court held that the Fair Employment Practices Act's

provision for the issuance of a complaint within 180 days after the filing of a charge was mandatory and that any complaint issued after the expiration of that time period was unauthorized. Dr. Zackai filed a timely petition for rehearing which challenged the constitutionality of the court's construction under the Fourteenth Amendment. The Illinois Supreme Court denied the rehearing petition on February 1, 1980.

THE QUESTIONS ARE SUBSTANTIAL

I. INTRODUCTION.

This case presents an important question about the constitutional limits on judicial and administrative efforts to resolve caseload backlogs. Severe backlogs have developed in courts and administrative agencies because of inadequate resources to meet the explosion of litigation which occurred in the 1960's and 1970's. As this Court is aware, great concern has focused on this problem in the administration of justice. New approaches have been tried to improve the speed and efficiency in the disposition of cases. Many courts and agencies have established administrative units to monitor caseloads, often using the most modern computer technology available. New procedural tools have been developed for the early screening of cases to identify those with little likelihood of success and those which may be amenable to settlement. This case demonstrates how over-zealous solutions can violate the equal protection and due process rights of parties to have their cases heard and decided rather than simply being disposed of without regard to the merits.

The Illinois legislature provided that the Fair Employment Practices Commission should investigate every charge of an unfair employment practice to determine which are supported by sufficient evidence to proceed to a hearing. The Illinois Fair Employment Practices Act requires that the Commission "shall either issue and serve a complaint ... or shall order that no complaint be issued" within 180 days from the filing of the charge. Ill. Rev. Stat. ch. 48, §858.01 (1975). Here the Commission failed to do either. The Illinois Supreme

Court ruled that the Commission's failure to decide this case within the 180 day period results in the Commission losing jurisdiction and the termination of Dr. Zackai's case. Over 2000 complainants are in the same position as Dr. Zackai. Unless this Court reverses the Illinois Supreme Court, the rights of these individuals and future complainants as well are jeopardized.

Although the Illinois legislature and the Illinois Supreme Court were seeking to meet the salutary goal of solving the backlog problem in the Commission's processing of employment discrimination charges, the method they choose was arbitrary. This Court should grant plenary review of this case to establish the constitutional limits on administrative efforts to cure backlogs of litigation. This Court should explicitly decide what many of its prior decisions have assumed or implied, that due process requires that parties in litigation are entitled at a minimum to decisions from the governmental adjudicator. This Court should determine whether persons who complained of discrimination in employment should lose solely because the Commission did not meet its statutory duty to complete investigations within 180 days or rather whether they should have their cases considered on the merits. This Court must announce that the obligation of the adjudicatory structure in our country is to decide cases and not simply to process them. If plenary review is granted, appellant is confident that this Court will rule that due process and equal protection preclude the loss of rights resulting solely from the failure of the administrative and judicial processes to decide cases through no fault or other cause attributable to the losing party.

II. SUPREME COURT REVIEW OF THIS CASE IS IMPORTANT BECAUSE THE TERMINATION OF CLAIMS SOLELY BECAUSE THE ILLINOIS FAIR EMPLOYMENT PRACTICES COMMISSION FAILED TO RULE WITHIN 180 DAYS IS IRRATIONAL AND VIOLATES EQUAL PROTECTION.

This Court should determine whether the termination of rights by reason of the Commission's failure to complete its investigation within 180 days is irrational and violates equal protection. This Court has consistently recognized that statutory classifications must meet the minimum test of rationality in order to comply with the requirements of equal protection. In Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911), Justice Van Devanter announced a lenient test:

> One who assails the classification in ... a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.220 U.S. at 78-79.

Later, in F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920), this Court announced a more stringent standard:

> [T]he classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.253 U.S. at 415.

In the 1960s, the more lenient test of legislative enactments was reformulated by Chief Justice Warren when, in McGowan v. Maryland, 366 U.S. 420 (1961), he wrote for a unanimous Court:

> Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power

> despite the fact that in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.366 U.S. at 425-26.

In the 1970s, this Court has employed several different approaches to analyze legislative classifications. Some have used an approach that prohibits certain conclusive or irrebuttable presumptions. Jimenez v. Weinberger, 417 U.S. 628 (1974); United States Department of Agriculture v. Murry, 413 U.S. 50 (1973). In Weinberger v. Salfi, 422 U.S. 749 (1975), Mr. Justice Rehnquist rejected the conclusive presumption approach and returned to the lenient rational scrutiny method. The most recent equal protection decisions of this Court have examined legislative classifications by considering whether there is a rational basis for the classification in light of the legislative purposes to be served. Under this approach, the Court will not overturn a statutory classification

> unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational. Vance v. Bradley, 440 U.S. 93, 97 (1979).

Under any of the modes of analysis discussed above, the classification used by the Illinois legislature fails to pass minimum scrutiny. An explanation of the statutory scheme for the litigation of claims before the Commission will demonstrate that the Illinois Supreme Court's interpretation of the 180-day requirement has no rational basis. The legislature established a screening procedure to sift out the meritorious claims from the

non-meritorious. It provides for a preliminary review of the charge by Commission staff. The Commission is required to decide whether the charge meets the threshold requirement of "substantial evidence" that an unfair employment practice occurred. If the Commission finds no substantial evidence, the charge is dismissed. If the Commission finds substantial evidence, it is to attempt conciliation. Ill. Rev. Stat., ch. 48, §858 (1975). If a settlement is not reached, the Commission is to issue a complaint and order that the case proceed to a public hearing. The complainant is then permitted to prosecute his case before an administrative law judge. The Commission has 180 days after a charge has been filed to either issue a complaint or dismiss the charge. §858.01(a).

After the Commission issues its complaint, the complainant takes over prosecution of his complaint. He then controls its progress through motions, discovery, pre-hearing procedures and the presentation of evidence and argument at the public hearing. §858.01(b). Each party may file briefs supporting or opposing the administrative law judge's recommended order and decision. Oral argument is permitted before the full Commission. §858.02(b). The parties may seek administrative review in the Circuit Court and further appellate review before the Illinois Appellate Court and before the Illinois Supreme Court in its discretion. The only time the progress of the proceedings is out of the control of the parties is during the investigation by the Commission.

Appellant only contests the Illinois Supreme Court's ruling that the failure of the Commission to act

within the 180 day period causes dismissal of the case. Appellant does not contest the procedures for screening cases in general. The failure of the Commission to decide within 180 days is not a rational way of choosing which of the cases should be allowed to proceed. It results in worse treatment for complainants than if their charges were dismissed for lack of substantial evidence within 180 days. It penalizes complainants when they had no control over meeting the deadline. It operates without regard to the relative merits of the cases. Finally, the classification is not rationally related to the basic purposes of the Fair Employment Practices Act.

The Illinois Supreme Court's decision is irrational because it results in worse treatment to the complainant than if the Commission had found no substantial evidence and dismissed the charge. The litigation is terminated because of the issuance of the writ of prohibition. Had the Commission dismissed the charge within 180 days, at least the appellant would have retained his right under the Administrative Review Act for judicial review of the dismissal in the Circuit Court. §860. If the Circuit Court had reversed the dismissal, it would remand to the Commission for issuance of the complaint and adjudication through a public hearing. However, the Illinois Supreme Court's writ of prohibition forbids any further proceedings including a decision by the Commission susceptible of judicial review. Under the Illinois Supreme Court's decision, a dismissal due to the Commission's failure to act within 180 days is not reviewable by any court for any reason.

The complainants are irrationally penalized by having their charges dismissed even though they had no responsibility for the Commission's failure to issue a complaint within 180 days. The classification is not like a statute of limitations which prescribes time limits on the initiation of an action by an individual. Ordinarily the individual controls the initiation of the proceedings and is fairly held accountable for meeting the statutory deadlines. Indeed, in this case, Dr. Zackai filed his charge within the time provided by the Fair Employment Practices Act. Typical statutes of limitations are not irrational because they serve to protect the adverse party from the prejudice of being surprised by stale claims. Weinberger v. Salfi, 422 U.S. 749 (1975). Here, the Board of Governors was informed of the claim by the timely filing of the charge.

Nor has any claim been advanced that Dr. Zackai was responsible in any way for the Commission's inaction. Dr. Zackai did not delay the proceedings. No procedures were available for Dr. Zackai to speed up the investigation or bring it to a decision. The 180 day time limit is not a waiting period like that provided in the federal Title VII action for the Equal Employment Opportunity Commission's investigation. He did not retain a private action to pursue on his own.[1/] Rather his claim was left

---

1/ The legislature enacted a statute to try to revive the actions terminated by the Illinois Supreme Court's decisions. The law provides that individuals whose charges were filed with the Commission before March 30, 1978 and where a complaint was not issued within 180 days could file an action in circuit court to pursue their claims of employment discrimination. Ill. Rev. Stat. ch. 48, §858.01a (added by Public Act 80-1455,

(footnote continued on next page)

in the hands of the Commission staff. When 180 days expired, whether because of bureaucratic delays, neglect, malice, or indecision, he lost.

Such a conclusive presumption to clear up caseload backlogs is irrational and must be condemned as a violation of equal protection. In other contexts, this Court has stated that "legal burdens should bear some relationship to individual responsibility or wrongdoing." Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972). In this case, equal protection demands an individualized determination on the merits of the charge.

The 180 day classification fares no better as a measure of the relative merits of the backlogged cases. First, the Commission staff failed to complete investigations within 180 days in almost all cases. Statistics have not been kept which show the percentage of cases in which the investigation was not completed within 180 days. However, the affidavit of James E. Braxton shows that as of January 1, 1978 2901 (or 81%) of the 3572 charges had been pending over 180 days for investigation before the Commission. Appendix, p.2c, Table II. Second, this case shows that the classification fails because ultimately the Commission found that there was

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(footnote continued from preceding page)

Section 1, effective September 16, 1978). Only a few cases have been filed in the circuit court and none have reached judgment. Since it creates a remedy retroactively, there are substantial questions concerning its validity under Illinois law and the United States Constitution. In its opinion in this case, the Illinois Supreme Court, although given the opportunity, did not give any indication of its views about the validity of the statute. Dr. Zackai is put in a most difficult position. If the Illinois Supreme Court's decision stands unreversed, he will be remitted to a circuit court action that may prove to be illusory. It too may be held to be a useless enterprise by the Illinois Supreme Court.

substantial evidence to support Dr. Zackai's charge. Nevertheless, he lost because the Commission violated its duty.

Appellant submits that equal protection requires an individualized decision on the merits. With all due respect, appellant analogizes the Commission's screening process to this Court's review of Jurisdictional Statements and Petitions for Certiorari. The exercise of discretion by this Court is necessary to select those cases which raise issues deserving of review. Likewise, the Commission chooses which cases shall proceed to a hearing. The constitutional violation occurred here because Dr. Zackai's charge was dismissed solely because of the Commission's failure to exercise its discretion. This Court would not deny review because its workload was so great that it precluded considering whether its discretionary standards were met. It might be that those standards are raised and lowered as workload pressures fluctuate. However, this Court would never allow cases to be rejected solely because the Justices or their clerks could not find time to consider them. None of the Justices of this Court would countenance a denial of review without first considering the merits of the request. To do so would not be rational. Deserving cases would be rejected and less deserving ones would be accepted. When decisions are made only by the use of irrational criteria, those who lose have not received equal treatment. This Court would not allow such unequal treatment in its discretionary decisions and should decide that it is not allowed with respect to charges

before the Illinois Fair Employment Practices Commission either.

Further, the dismissal of charges solely because of the failure of the Commission to comply with the 180 day provision is not rationally related to the primary purposes of the Illinois Fair Employment Practices Act. Section 851 sets forth the policy:

> [I]t is declared to be the public policy of this State that without in any way precluding any employer from selecting between persons of equal merit, ability, and capabilities, equal employment opportunity or apprenticeship opportunity without discrimination because of race, color, religion, sex, national origin, ancestry or unfavorable discharge from military service or physical or mental handicap unrelated to ability should be protected by State law.
>
> It is also the public policy of this State to protect employers, labor organizations and employment agencies from unfounded charges of discrimination. Ill. Rev. Stat. ch. 48, §851(1) (1975).

As has been demonstrated above, the Illinois Supreme Court's decision does not protect equal employment opportunity from discrimination since meritorious charges are dismissed.

While this Court has never directly addressed the limits on efforts to eliminate backlogs, it has rejected the justification of speed and efficiency to the exclusion of considerations of merit. In Stanley v. Illinois, 405 U.S. 645 (1972), equal protection rights were held to be violated when fathers of illegitimate children were conclusively denied custody. This Court recognized the efficiency of the presumption but ruled efficiency was not sufficient.

> The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency.... Indeed, one might fairly say of the Bill of Rights in general,. and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones. 405 U.S. at 656.

III. A SUBSTANTIAL AND IMPORTANT QUESTION IS PRESENTED WHETHER DUE PROCESS REQUIRES, AT A MINIMUM, A DECISION ON THE MERITS OF EACH CASE BY THE ILLINOIS FAIR EMPLOYMENT PRACTICES COMMISSION.

This Court should grant plenary review to determine whether due process precludes the government from resolving disputes between private parties by its failure to make a decision on the merits. By enacting the Fair Employment Practices Act, the Illinois legislature sought to remedy one of the major social ills of Illinois and this nation: discrimination in the terms and conditions of employment based on race, sex, religion, national origin, or physical or mental handicap. The Fair Employment Practices Act creates substantive rights or interests in protected individuals to be free from employment discrimination based on impermissible factors and entitles them to receive equitable relief, including back pay lost as a result of past acts of discrimination. This Court should decide that an individual is protected from being arbitrarily deprived of these types of interests by the procedural guarantees of the Fourteenth Amendment of the United States Constitution.

In the past civil litigants have been afforded due process protection. Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950). See also Wolff v. McDonnell,

418 U.S. 539 (1974) (protection given prisoners' rights to litigate civil rights actions as well as habeas corpus petitions). As this Court has stated:

> It is apparent from our decisions that there exists a variety of interests which are difficult of definition but are nevertheless comprehended within the meaning of either "liberty" or "property" as meant in the Due Process Clause. These interests attain this constitutional status by virtue of the fact that they have been initially recognized and protected by state law ... and we have repeatedly ruled that the procedural guarantees of the Fourteenth Amendment apply whenever the State seeks to remove or significantly alter that protected status. Paul v. Davis, 424 U.S. 693, 710-11 (1976).

The process which is due when the state deprives an individual of an interest it created should be governed by the Constitution and not, necessarily, by procedures authorized by the legislature. Arnett v. Kennedy, 416 U.S. 134 (1974) (views of six justices). Although it has never been directly decided, this Court should now decide the substantial question whether state action, such as that authorized by the Illinois Supreme Court, comports with the minimum requirements of due process.

The decision by the Illinois Supreme Court legitimizes the deprivation of an individual's rights through state inaction. The ruling resulted in the termination of Dr. Zackai's rights under the Fair Employment Practices Act because of the Commission's failure to complete its investigation and reach a decision on the merits of his charge within 180 days. Dr. Zackai was never notified of the impending termination of his rights nor given a meaningful hearing on the merits of his charge. The decision approved arbitrary and unilateral state action as a means of terminating Dr. Zackai's rights.

Due Process requires "an opportunity ... granted at a meaningful time and in a meaningful manner," Armstrong v. Manzo, 380 U.S. 545, 552 (1965), "for a hearing appropriate to the nature of the case," Mullane v. Central Hanover Trust Co., 339 U.S. 306, 313 (1950). Under this Court's prior decisions, the form of the required hearing has depended upon the context. In Bell v. Burson, 402 U.S. 535 (1971), this Court struck down a Georgia statute which provided for the suspension of the driver's license of an uninsured motorist who was involved in an accident unless security was posted equal to the amount of damages claimed. No administrative hearing at which fault and liability could be decided was conducted prior to the suspension. In arriving at its decision, this Court recognized that the underlying purposes of this statute related to the ultimate adjudication of private tort suits seeking damages:

> Since the only purpose of the provisions before us is to obtain security from which to pay any judgments against the licensee resulting from the accident, we hold that procedural due process will be satisfied by an inquiry limited to the determination whether there is a reasonable possibility of judgments in the amounts claimed being rendered against the licensee. 402 U.S. at 540.

Thus, this Court held that due process required a preliminary determination of the question of liability. In Mullane, supra, due process was held to require that the beneficiaries of a common trust receive prior notice and a hearing before a judicial settlement of accounts by the trustee. A decision which did not provide for the meaningful consideration of the interests of the beneficiaries might "cut off their rights to have the trustee

answer for negligent or illegal impairments of their interests." 306 U.S. at 313.[2/] In both Fuentes v. Shevin, 407 U.S. 67 (1972) and Sniadach v. Family Finance Corp., 395 U.S. 337 (1969), a decision on the merits was required before a private party could avail himself of state procedures for altering property rights of other private parties. The common theme running throughout these cases is that due process requires at least a preliminary decision on the merits before state action can be employed in adjusting the rights of one private party vis-a-vis the other.

Although the form of the hearings approved in the above cases varies considerably, the common denominator in all was a hearing with a decision based on the merits or at least an evaluation of the chance for success on the merits. Appellant agrees that the legislature can provide for the screening of cases by the Commission and that the procedures provided in the Fair Employment Practices Act are constitutionally sufficient if they result in a preliminary decision on the merits. The use of the "substantial evidence" test for the evaluation of the worth of a case is appropriate if the Commission actually uses the test to choose which cases can continue. However, appellant submits that the arbitrary dismissal of

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2/ Justice Stevens has stated, discussing Mullane, supra:

> Whenever one private party seeks relief against another, it is fundamental that some attention to the merits of the request must precede the granting of relief. New Motor Vehicle Board of California v. Orrin W. Fox Co., 439 U.S. 96, 125 (1978) (J. Stevens, dissenting).

his charge merely because the Commission failed to render a timely decision violates the principles of due process.

Analogous to the present situation are temporary suspensions of licenses pending final adjudication of the grounds for termination. As discussed above, Bell v. Burson, supra, held that due process was violated because a drivers license was suspended without a preliminary adjudication of liability or fault. Quite recently, the Court has spoken again on the same general issue. In Barry v. Barchi, ___ U.S. ___, 99 S.Ct. 2642 (1979), the Court held that procedures for the temporary suspension of a racehorse trainer after one of his horses had been drugged were adequate. Because the state adduced evidence demonstrating probable cause that the trainer was at least negligent with respect to the drugging, a temporary suspension was permissible pending a prompt and effective adversary hearing. In light of these cases, Dr. Zackai was constitutionally entitled to a decision before his case was dismissed.

This Court has never decided whether state agencies such as the Commission which process employment related claims of public employees must meet the requirements of due process. It is well established that tenured public teachers have a constitutionally protected property interest in continued employment. Perry v. Sindermann, 408 U.S. 593 (1972). See also Board of Regents v. Roth, 408 U.S. 564, 576-77 (1972); Slochower v. Board of Education, 350 U.S. 551 (1956). A state created property interest may not be terminated in the absence of due process of law. See Perry v. Sindermann, 408 U.S. 593

(1972); Board of Regents v. Roth, 408 U.S. 564 (1972). At a minimum, due process requires notice, a hearing and a decision prior to the deprivation. See Mullane v. Central Hanover Trust Co., 339 U.S. 306, 313 (1950).3/

The Fair Employment Practices Act is one of the methods provided by the state for its employees to challenge the termination of their employment. The term "employer" is defined to include the State of Illinois and its related governmental units, as well as private employers employing fifty or more persons. Ill. Rev. Stat. ch. 48, §852(d) (1975). Dr. Zackai's unfair employment practice charge alleged that his former employer, the Board of Governors, had discriminated against him because of his physical handicap. Appellant had been employed as a tenured professor by Chicago State University, a part of the Board of Governors system. Because of his tenured status and the fact that Board of Governors is a state entity, Dr. Zackai had a constitutionally protected interest in his continued employment. Thus, he was entitled to notice, a hearing

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3/ Another basis for a due process entitlement may be the interests in employment generally. In Truax v. Raich, 239 U.S. 33, 41 (1915), the Court declared that "...the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." More recently, in Hampton v. Mow Sun Wong, 426 U.S. 88 (1976), a Civil Service Commission rule barring all non-citizens from federal employment was held unconstitutional. Justice Stevens observed for the Court that "ineligibility for employment in a major sector of the economy" was a loss "of sufficient significance to be characterized as a deprivation of an interest in liberty." Id. at 102. See also Examining Board of Engineers v. Flores de Otero, 426 U.S. 572 (1976) (statutory restriction on the ability of aliens to engage in the otherwise lawful private practice of civil engineering is plainly unconstitutional as violation of equal protection and due process clauses).

and a decision on the question of whether his right to continued employment had been violated. However, Dr. Zackai received no meaningful hearing because a decision on the merits was never made. Rather, he was deprived of his rights through unilateral and arbitrary state action.

CONCLUSION

For these reasons, the appellant respectfully prays that this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

Gary H. Palm
Counsel for Appellant

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(312) 324-5181

Glenn M. Engelmann and Linda E. Fisher, Senior Law Students at the University of Chicago Law School, assisted in the preparation of this jurisdictional statement.

Docket Nos. 51863, 51947 cons.—Agenda 38—
September 1979.

THE BOARD OF GOVERNORS OF STATE COLLEGES AND UNIVERSITIES FOR CHICAGO STATE UNIVERSITY, Appellant, v. THE ILLINOIS FAIR EMPLOYMENT PRACTICES COMMISSION *et al.*, Appellees.—ROYAL CROWN BOTTLING COMPANY OF CHICAGO, Appellant, v. THE ILLINOIS FAIR EMPLOYMENT PRACTICES COMMISSION *et al.*, Appellees.

MR. CHIEF JUSTICE GOLDENHERSH delivered the opinion of the court:

These consolidated cases present the question, first considered by this court in *Springfield-Sangamon County Regional Plan Com. v. Fair Employment Practices Com.* (1978), 71 Ill. 2d 61, whether the Fair Employment Practices Commission (FEPC) is empowered to issue a complaint against an employer more than 180 days after the filing of an unfair employment practices charge.

Section 8.01(a) of the Fair Employment Practices Act (Ill. Rev. Stat. 1977, ch. 48, par. 858.01(a)), prior to its amendment (see Pub. Act 80—1452, effective Sept. 16, 1978; Pub. Act 80—1455, effective Sept. 16, 1978), provided in part:

> "Whenever such a charge of an unfair employment practice has been properly filed, the Commission, within 180 days thereof or within any extension of that 180 day period agreed to in writing by all parties and approved by a member of the Commission, shall either issue and serve a complaint in the manner and form set forth in this Section or shall order that no complaint be issued. ***"

In cause No. 51863, a charge of unfair employment practice was filed with the FEPC on November 30, 1976, alleging that petitioner, the Board of Governors of State Colleges and Universities for Chicago State University, wrongfully refused to permit respondent Nahum Zackai to rescind a letter of resignation. On June 22, 1978, more than a year after the expiration of the 180-day statutory period, the FEPC issued a complaint against petitioner seeking reinstatement and back wages. Petitioner moved to dismiss the complaint, asserting that it was barred by section 8.01(a) of the Act. The hearing officer for the FEPC denied the motion and ordered petitioner to answer the complaint. We allowed petitioner's motions for leave to file a petition for writ of prohibition and to stay the FEPC proceedings. Respondents moved to dismiss, and their motions were taken with the case.

Cause No. 51947 involves a charge filed with the FEPC by Werner Herb on March 22, 1976, alleging that plaintiff, Royal Crown Bottling Company of Chicago,

discriminated against him because of a physical handicap. On October 4, 1978, more than two years after the expiration of the 180-day statutory period, the FEPC issued a complaint. Plaintiff's motion to dismiss the complaint was denied by the hearing officer. Plaintiff filed an action in the circuit court of Cook County seeking to enjoin the FEPC from proceeding. The circuit court denied preliminary injunctive relief. Plaintiff appealed to the appellate court, and we allowed its motion for direct appeal (58 Ill. 2d R. 302(b)). We also allowed the motion of Werner Herb that he be either added as an indispensable party or allowed to intervene as a party defendant.

We consider first the contention of defendant Herb that plaintiff's request for an injunction should be denied because it had failed to exhaust its administrative remedies and that it had an adequate remedy at law. He argues that the only administrative decision made in this matter is the interlocutory order of the hearing officer denying Royal Crown's motion to dismiss, that the order is not final, and that review of the Commission's final order can be had only under the provisions of the Administrative Review Act (Ill. Rev. Stat. 1977, ch. 48, par. 861). Citing a number of authorities (*Illinois Bell Telephone Co. v. Allphin* (1975), 60 Ill. 2d 350; *Bulk Terminals Co. v. Environmental Protection Agency* (1976), 65 Ill. 2d 31; *People ex rel. Naughton v. Swank* (1974), 58 Ill. 2d 95; *Chicago Welfare Rights Organization v. Weaver* (1973), 56 Ill. 2d 33), he argues that "to allow this case to proceed in the courts would be to allow Royal Crown to circumvent the statutory review procedures provided in the FEPA by the General Assembly."

The authorities cited are clearly distinguishable and apposite here is our holding in *Landfill, Inc. v. Pollution Control Board* (1978), 74 Ill. 2d 541. In that case the plaintiff brought an action seeking a declaratory judgment that a procedural rule of the Board was not authorized under the Environmental Protection Act. In deciding that the plaintiff was not required to exhuast its remedies, we said:

> "This court has held that where an administrative rule asserting administrative authority is challenged on its face as not authorized by the enabling legislation, exhaustion is not required. (*Bio-Medical Laboratories, Inc. v. Trainor* (1977), 68 Ill. 2d 540, 548.) Exhaustion is not required where a statute or rule under which an administrative body purports to act is challenged as unauthorized, since the judicial determination will affect the jurisdiction of the administrative body in all matters, not only in the instant

circumstances (see *Walker v. State Board of Elections* (1976), 65 Ill. 2d 543, 552).

The purposes for the exhaustion requirement are not served where an administrative assertion of authority to hear or determine certain matters is attacked on its face on the grounds that the assertion of jurisdiction is not authorized by statute. *** Where an agency's statutory authority to promulgate a rule and exercise jurisdiction is in issue, no questions of fact are involved. The agency's particular expertise is not implicated in statutory construction. Further, there is virtually no chance the aggrieved party will succeed before an agency where the issue is the agency's own assertion of authority. ***

We conclude that where an administrative body's assertion of jurisdiction is attacked on its face and in its entirety on the ground that it is not authorized by statute, exhaustion of administrative remedies and compliance with the Administrative Review Act is not required. Under these circumstances the judicial determination involves a question of law which will affect the jurisdiction of the administrative body in all cases and will hasten the administration of justice." 74 Ill. 2d 541, 550-51.

Citing *Springfield-Sangamon County Regional Plan Com. v. Fair Employment Practices Com.* (1978), 71 Ill. 2d 61, petitioner and plaintiff contend that, in issuing complaints more than 180 days after the filing of the charges, the FEPC had exceeded its statutory authority. It is the contention of the defendants that under our holding in *Springfield-Sangamon* the FEPC was authorized to issue the complaints, and in ruling on the motions to dismiss was empowered to make a case-by-case determination of the question whether the failure to file within the 180-day period was prejudicial to the employer.

Defendants' argument, in part, rests on the fact that in *Springfield-Sangamon* the court did not overrule *Moss-American, Inc. v. Illinois Fair Employment Practices Com.* (1974), 22 Ill. App. 3d 248, but held it to be inapposite. (71 Ill. 2d 61, 72.) The question presented in *Moss-American* was whether the 180-day period expired on November 2, 1968, or November 9, 1968. The hearing officer and the FEPC determined that the period expired on the latter date (22 Ill. App. 3d 248, 253) and the appellate court was not required to decide the question whether the FEPC exceeded its authority in issuing the complaint. Although the court in *Springfield-Sangamon* made reference to "waiver, estoppel and extension by the

parties" (71 Ill. 2d 61, 69), the record presented no such issues. A judicial opinion is authority only for what is actually decided (*Gannon v. Chicago, Milwaukee, St. Paul & Pacific Ry. Co.* (1961), 22 Ill. 2d 305; *Village of Lombard v. Illinois Bell Telephone Co.* (1950), 405 Ill. 209), and the clear and unequivocal holding of *Springfield-Sangamon* is that "the 180-day period prescribed in the statute was intended to ensure expeditious action on behalf of the FEPC, and must be considered mandatory." 71 Ill. 2d 61, 68.

From our examination of the statute we conclude that the legislative intent was that the complaint be filed within 180 days of the charge and that absent an extension of the 180-day period agreed to in writing by all parties, and approved by a member of the FEPC, the filing of the complaint subsequent to the expiration of that time was unauthorized. We need not consider the question whether conduct other than an agreement in writing may be sufficient to extend the period, since the record presents no such question and, in each instance, the motions to dismiss filed with the FEPC show clearly that the limitation was not waived.

The parties have argued the question whether, under the circumstances presented, the issuance of a writ of prohibition is appropriate. The rule governing issuance of the writ of prohibition is stated in *People ex rel. Town Court v. Harrington* (1961), 21 Ill. 2d 224, 226, wherein the court said: "A writ of prohibition is an extraordinary judicial process whereby a superior court may prevent inferior tribunals or persons from exercising a jurisdiction with which they have not been vested by law." Its use is equally appropriate to prevent further proceedings when failure to act within the period fixed by statute renders void the actions of an administrative agency. See *Cummings v. Daley* (1974), 58 Ill. 2d 1; *Szkirpan v. Board of Education* (1975), 29 Ill. App. 3d 1047.

For the reasons stated it is ordered that in cause No. 51863 the writ of prohibition be issued, and that in cause No. 51947 the order of the circuit court of Cook County is reversed and the cause is remanded for further proceedings consistent with this opinion.

51863 - Writ awarded.
51947 - Reversed and remanded.

ILLINOIS SUPREME COURT
CLELL L. WOODS, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

February 1, 1980

Mr. Randolph N. Stone
Attorney at Law
Mandel Legal Aid Clinic
6020 S. University Ave.
Chicago, IL 60637

Nos. 51863 - Board of Governors of State Colleges and Universities for Chicago State University, et al., petitioners, vs. Illinois Fair Employment Practices Commission, a State Agency; et al., etc., et al., respondents. Prohibition.
51947 Cons.

The Supreme Court today denied the petition for rehearing in the above entitled cause.

Very truly yours,

Clell L. Woods

Clerk of the Supreme Court

APPENDIX

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

Affidavit

James E. Braxton, being first duly sworn, on oath deposes and states as follows:

1. That he is Executive Director of the Illinois Fair Employment Practices Commission.

2. That in said capacity he is familiar with the various records, surveys and docket summaries concerning the caseload of charges filed with and disposed of by the Commission in recent years.

3. That those sources reveal that the Commission's caseload activity for the four most recent fiscal years has been approximately as portrayed in Table I below:

TABLE I

Caseload Data

	FY 74	FY 75	FY 76	FY 77	FY 78
Charges filed during year	1668	2301	2759	2120	———
Carried over from prior year	1624	1717	2233	3077	3481
Charges disposed of during year	1575	1785	1915	1716	———

4. That Commission records reveal the following approximate breakdown by age of charges which were pending for investigation by the Commission as of the dates indicated:

TABLE II

Charges Pending Longer Than 180 Days

	As of 7/1/76	As of 1/1/78
Number of Charges Pending More Than 180 Days	1453	2901
Total Charges Pending For Investigation	3077	3572

5. That the Commission's appropriation from the State's general revenue fund over the last four fiscal years has been as follows:

TABLE III

General Revenue Fund Appropriations to Commission

(Thousands of Dollars)

FY 74	FY 75	FY 76	FY 77
830.1	950.1	921.9	1114.1

6. That Commission records reveal the following approximate breakdown, by type of discrimination alleged, of charges filed with the Commission during the last four fiscal years.

TABLE IV

Charges Filed By Type

	FY 74 %	FY 75 %	FY 76 %	FY 77 %
Race, Color	812 (48.7)	987 (42.9)	1,352 (49.2)	877 (41.4)
Sex	466 (28.0)	1,049 (45.6)	755 (27.3)	476 (22.5)
Religion	20 (1.2)	21 (.9)	47 (1.7)	28 (1.3)
National Origin/ Ancestry	167 (10.0)	145 (6.3)	248 (.9)	232 (10.9)

TABLE IV cont.

Charges Filed By Type

	FY 74	%	FY 75	%	FY 76	%	FY 77	%
Retaliation	42	(2.5)	51	(2.2)	44	(1.6)	62	(2.9)
Arrest	7	(.4)	6	(.3)	19	(.7)	6	(.3)
Handicaps	0	(.0)	0	(.0)	91	(3.2)	211	(10.0)
Military Discharge	0	(.0)	0	(.0)	0	(.0)	2	(.1)
Multiple	154	(9.2)	42	(1.8)	203	(7.3)	226	(10.6)
	1,668		2,301		2,759		2,120	

Further affiant sayeth not.

Affiant

Subscribed and Sworn to before me

this 17th day of February, 1978

NOTARY PUBLIC

IN THE MATTER OF:

NAHUM ZACKAI,

Complainant,

AND

BOARD OF GOVERNORS,
CHICAGO STATE UNIVERSITY,

Respondent.

CHARGE NO. 1977 CN 0485

ORDER

1. Respondent has filed a motion to dismiss the above-captioned matter on two distinct grounds, the first being the Commission's failure to issue the complaint within 180 days of the filing of the underlying charge. The factual allegations are not at issue. Neither complainant nor the Commission denies that the charge was filed on November 30, 1976 or that the complaint issued on June 22, 1978. Simple arithmetic reveals that the complaint issued approximately 13 months after the expiration of the 180-day period prescribed for issuing complaints in §8.01(a) of the Fair Employment Practices Act.

Respondent, relying upon the recent decision of the Illinois Supreme Court in Springfield-Sangamon County Regional Plan Commission v. Fair Employment Practices Commission, 71 Ill. 2d 63, 373 N.E. 2d 1307 (1978), contends that the 180-day provision is mandatory and that failure to issue a complaint within that period is therefore fatal. Complainant argues that this matter may be easily distinguished from Springfield on its facts. Complainant further contends that the issues raised by respondent's motion ought to be decided in accordance with the holding in Moss-American, Inc. v. FEPC, 22 Ill. App. 3d 248, 317 N.E. 2d 343 (5th Dist. 1974). Complainant also relies upon a variety of policy arguments. Staff counsel for the Commission has elected not to submit argument.

The Commission addressed the 180-day issue for the first time since the Springfield decision only recently. [1/] Its decision to adopt an order denying a motion to dismiss in Cooper and Weiboldt Stores et al., FEPC Charge Nos. 1976 CN 0156 and 1976 CN 0157, controls the issues raised by respondent's motion. The order in Cooper found that the 180-day provision is not mandatory, as delay in issuing the complaint was only one factor in creating the prejudice to respondent that warranted dismissal in Springfield. Judge Humphrey determined that a 19 month delay in issuing the complaint was not grounds for dismissal because the employer in Cooper, unlike the Regional Plan Commission, had been a party since the inception of the proceedings. Cooper also rejected the respondent's contention that the increased liability caused by a delayed complaint is prejudicial to the extent that it requires dismissal of the claim.

The present matter is far more similar on its facts to Cooper than to Springfield. The procedural irregularities that compounded the delay in issuing the complaint in the Supreme Court decision are not present here. The delay is shorter than in either case.

Amendments enacted after Cooper further support Judge Humphrey's determination that respondent suffers no special harm if the Commission issues an untimely complaint. P.A. 80-1455 preserves complainant's claim regardless of the timeliness of the complaint. Consequently, respondent remains subject to suit on the issues raised therein well beyond the 180-day period.

2. Respondent further contends that complainant must prosecute his complaint in the Court of Claims. Relying primarily upon Kane v. Board of Governors of State Colleges and Universities, 43 Ill. App. 3d 315, 356 N.E. 2d 1340 (4th Dist. 1976), respondent asserts that §8 of the Court of Claims Act, Ill. Rev. Stat. ch. 37 §439.8 (1977), bars the

1/ Although the decision in Springfield came down on January 20, 1978, the Commission was unable to take a position in response thereto for nearly one year. After denying a petition for rehearing on March 30, 19 the Court stayed the mandate until July 10, 1978. On August 31, Chief Administrative Law Judge Humphrey entered the first order dealing with the issues raised in Springfield and certified it to the Commission for an interlocutory decision. Judge Humphrey's decision in Cooper and Weiboldts Stores, Inc. et al., FEPC Charge Nos. 1976 CN 0156 and 1976 CN 0157, was argued on December 13, 1978 and formally adopted on January 10, 1979.

Commission from hearing this matter because it is a claim against the state, founded upon a state law. There is no doubt that Kane found the Board of Governors to be an "arm" of the state. There is substantial question, however, as to whether such a determination leads to the conclusion that all claims against that body automatically fall within the exclusive jurisdiction of the Court of Claims.

The provisions of the FEPA and the Court of Claims Act ("CCA") appear to conflict on this point. §8 (a) of the latter provides the Court with exclusive jurisdiction to hear and determine:. ."(a) All claims against the state founded upon any law of the State of Illinois. .." At the same time, however, §6.07 of the FEPA empowers the Commission "[t]o issue, receive, investigate, and determine charges filed with it in conformity with this Act." Further, §2(d)(ii) of the Act specifically enumerates the State as an employer subject to the authority of the Commission. Thus, the issue raised by respondent's motion is not whether the Board of Governors is an arm of the state, but rather whether addition of the word exclusive to §8 of the CCA was intended to supersede the Commission's authority to determine claims against the state.

Kane is of little assistance on this point because the jurisdiction dispute in that case involved the Workman's Compensation Act, which is expressly excepted from the provisions of the CCA. Case authority cited by respondent that construes those subparagraphs other than (a) of §8 is equally irrelevant; those cases did not involve statutory provisions and consequently can shed little light upon resolving conflicts arising between the CCA and other statutes.

As there are no cases deciding the status of Commission proceedings under the CCA, I must apply general criteria to determine the proper forum for complainant's claim. The Illinois Supreme Court set forth one standard for making such a determination in Chicago Welfare Rights Organization v. Weaver, 56 Ill. 2d 41, 305 N.E. 2d 140 (1973), appeal denied, cert. denied, 417, U.S. 962 (1974). In Weaver recipients of public assistance benefits were seeking money judgments for benefits allegedly denied them for improper reasons. The Court rejected the

holding of the Appellate Court that the plaintiffs were required to bring suit in the Court of Claims to provide for orderly disbursement of the state funds. The Court explained:

> In our opinion, the fact that the General Assembly had made available an administrative remedy, followed by judicial review, negatives the conclusion of the Appellate Court that the plaintiff's only remedy was by a proceeding in the Court of Claims. 56 Ill. 2d 33, 40.

The arguments opposing the exclusive jurisdiction of the Court of Claims are, in my view, far stronger in the present matter. Not only does §10 of the Act provide for the judicial review viewed as critical in Weaver, but the legislature has specifically named the state as an employer subject to the authority of the Commission. As a consequence, I must conclude that complainant is not required to pursue his claim in the Court of Claims.

In view of the foregoing it is hereby ordered that:

1. Respondent's motion to dismiss is denied.

2. Respondent shall file an answer within 15 days of the service of this order, pursuant to §10.5 of the Rules and Regulations of the Commission.

3. The public hearing shall commence on May 9-11, 1979, as per the attached Amended Notice of Public Hearing.

4. The pre-hearing memorandum shall be filed on or before April 30, 1979.

5. Because of the prolonged delay already imposed upon this matter no continuances will be granted to prepare for hearing.

FAIR EMPLOYMENT PRACTICES COMMISSION

BY: Patricia A. Patton
PATRICIA A. PATTON
Administrative Law Judge
Administrative Law Division

ENTERED THIS 31ST DAY OF JANUARY 1979

IN THE MATTER OF:

NAHUM ZACKAI,

COMPLAINANT,

AND

BOARD OF GOVERNORS,
CHICAGO STATE UNIVERSITY,

RESPONDENT.

CHARGE NO. 1977 CN 0485

O R D E R

1. On February 16, 1979 respondent moved for reconsideration of my order denying its motion to dismiss. At that time I was advised for the first time that a suit is presently pending in the Court of Claims relating to the same issues before the Commission in this matter. As the public hearing was not scheduled to commence for some time, I allowed respondent the opportunity to submit authority in support of the proposition that the action pending in the Court of Claims barred complainant from proceeding before the Commission. Respondent's Points and Authorities of March 9, 1979 did not address that issue other than to state that complainant, by filing in the Court of Claims, "has recognized that the Illinois Court of Claims has jurisdiction with respect to his claim and is estopped from arguing that said jurisdiction is not exclusively in the Court of Claims." As respondent presents no authority in support of its position, I have no reason to see its "Points" as anything but bootstrapping 1/ and repetition of the issues presented in the motion to dismiss.

2. Complainant has filed a Motion to Compel Answer to Complaint, wherein he cites my order of January 31, 1979 requiring respondent to file an answer within fifteen days of the date of service. Respondent apparently filed its Motion for Reconsideration in lieu thereof.

1/ Respondent also argues that it is within my power to dismiss the complaint whether or not dismissal is mandatory by the Court of Claims Act. Respondent fails to specify, however, on what grounds I should choose to exercise this authority, assuming it exists. Further, I can find no 4.6B in the Rules and Regulations of the Commission, as amended August, 1978.

Rather than consume time and energy debating the propriety of respondent's course of action, we would do better to proceed to the merit without further delay by establishing a new schedule.[2/]

In view of the foregoing, it is hereby ordered that:

1. Respondent's motion for reconsideration is denied;
2. Complainant's motion to compel answer to complaint is denied;
3. Respondent shall file an answer to the complaint in this matter on or before March 30, 1979;
4. In light of the frivolous delay imposed by respondent's motion for reconsideration, complainant is given leave to undertake discovery procedures prior to the filing of respondent's answer.

FAIR EMPLOYMENT PRACTICES COMMISSION

BY: Patricia A. Patton
PATRICIA A. PATTON
Administrative Law Judge
Administrative Law Division

ENTERED: MARCH 13, 1979.

2/ In order to expedite matters, I have not waited 5 days as provided by Section 11.8 of the Rules and Regulations of the Commission. Time has already been consumed needlessly, and the deficiencies of respondent's position are apparent on the face of its Points and Authorities.

Ill. Rev. Stat. ch. 48, §§851 et seq. (1975):

FAIR EMPLOYMENT PRACTICES ACT

Title as amended by P.A. 79-186, §2.

***

851. §1. Declaration of policy.) Whereas denial of equal emloyment opportunity because of race, color, religion, sex, national origin, ancestry or unfavorable discharge from military service, or physical or mental handicap unrelated to ability with consequent failure to utilize the productive capacities of individuals to the fullest extent deprives a portion of the population of the State of earnings necessary to maintain a reasonable standard of living, thereby tending to cause resort to public charity and may cause conflicts and controversies resulting in grave injury to the public safety, health and welfare:

Therefore, it is declared to be the public policy of this State that without in any way precluding any employer from selecting between persons of equal merit, ability, and capabilities, equal employment opportunity or apprenticeship opportunity without discrimination because of race, color, religion, sex, national origin, ancestry or unfavorable discharge from military service or physical or mental handicap unrelated to ability should be protected by State law.

It is also the public policy of this State to protect employers, labor organizations and employment agencies from unfounded charges of discrimination.
Amended by P.A. 79-186, §1, eff. Oct. 1, 1975; P.A. 79-370, §1, eff. Oct. 1, 1975.

852. §2. Definitions.) When used in this Act, unless the context otherwise requires, the term:

***

(d) "Employer" includes and means: (i) any person (as defined in this Section) employing 50 or more persons within the State within each of 20 or more calendar weeks within the current or preceding calendar year prior to July 1, 1968, beginning July 1, 1968, any person employing 25 or more persons during 20 or more calendar weeks within any calendar year, and beginning January 1, 1976, any person employing 15 or more persons during 20 or more calendar weeks within any calendar year; (ii) the State and any political subdivision, municipal corporation or other governmental unit or agency thereof, without regard to the number of emloyees. The term "employer" does not include any religious corporation, association, educational institution or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution or society of its activities.

***

853. §3. Unfair employment practices.) It is an unfair employment practice:

(a) For any employer, because of the race, color, religion, sex, national origin, ancestry or physical or mental handicap unrelated to ability of an individual, or an unfavorable discharge from military service, to refuse to hire, to segregate, or otherwise to discriminate against such individual with respect to hire, selection and training for apprenticeship in any trade or craft, tenure, terms or conditions of employment.

***

856. §6. Powers and duties of the Commission.) In addition to other powers and duties prescribed in this Act, the Commission shall have the powers and duties enumerated in Sections 6.01 through 6.08. As amended by act approved Aug. 11, 1967, L.1967, p. 2853.

***

856.07 Charges--Receiving and investigation.] §6.07. To issue, receive, investigate and determine charges filed with it in conformity with this Act. Amended by P.A. 79-548, §1, eff. Oct. 1, 1975.

***

858. §8. Procedure--Charge, investigation, conference, settlement and adjustment.) Whenever within 180 days after the date that an unfair employment practice allegedly has been committed, a charge in writing under oath or affirmation is filed with the Commission by a complainant or by the Commission upon a vote of at least 3 members and in such detail as to substantially apprise any party properly concerned as to the time, place and facts with respect to such alleged unfair employment practice, that any employer, labor organization, employment agency, or person, hereinafter referred to as a respondent, has committed such unfair employment practice, the Commission shall promptly serve a copy of the charge within 10 days on the respondent and thereafter shall institute an investigation by its employees to ascertain the facts relating to such alleged unfair employment practice. If it is determined by the Commission, after such investigation, that there is not substantial evidence that the alleged unfair employment practice has been committed, the charge shall be dismissed; otherwise the Commission, a Commissioner or a hearing officer, who shall be an attorney licensed to practice in Illinois, designated by the Commission, shall endeavor to eliminate the effect thereof and prevent repetition thereof by means of conference and conciliation. The complainant and respondent shall be notified of the time and place of the conference by registered or certified mail at least 10 days prior thereto and either or both parties shall appear at such conference or conciliation in person or by

attorney. The place fixed shall be within 35 miles of the place where the unfair practice is alleged to have been committed. What occurs in the conference or conciliation meeting shall not be disclosed by the Commission unless the complainant and respondent agree in writing that such disclosure be made. When a settlement is effectuated in conference and conciliation conducted by a Commissioner or hearing officer,the terms of settlement and adjustment shall be subject to the approval of the Commission. The Commission shall notify the complainant and the respondent of the disposition of every charge filed and the terms of any settlement, adjustment or dismissal thereof. Any memeber of the Commission who takes part in an investigation shall thereby be disqualified to hear any evidence on the cause in question. Except as provided in this Section, the manner and form of filing charges shall be in accordance with such rules and regulations as the Commission shall from time to time prescribe. If a settlement is effectuatd, and the terms thereof are approved by the Commission, then the Commission shall prepare written terms of settlement and adjustment and have the complainant and respondent agree to them in writing. The Commission shall then enter upon all parties an order in accord with the executed written terms of settlement and adjustment. If the Commission determines after an investigation that there is substantial evidence that the respondent has violated the terms of settlement and adjustment and the order entered pursuant thereto, the Commission may either commence an action pursuant to Section 11 of this Act, or issue a written complaint and order a public hearing on such alleged violation, and, finding that such alleged violation has occurred, may then order such remedies as may be necessary to correct the violation. If the Commission finds that no violation has occurred it shall dismiss the complaint. If terms of settlement and adjustment not approved by the Commission are entered into by a complainant and respondent, the Commission need not enter an order in accord therewith and may terminate further proceedings in the case. The Commission may dismiss a charge if, in conference and conciliation, it is established to the satisfaction of the Commission that the respondent has taken steps to eliminate the effects of the unfair employment practice charged and prevent the repetition thereof, or if, in conference and conciliation, the respondent offers and the complainant declines to accept terms of settlement and adjustment which the Commission finds are sufficient to eliminate the effects of the unfair employment practice charged and prevent the repetition thereof.
Amended by P.A. 79-548, §1, eff. Oct. 1, 1975.

858.01 §8.01. Procedure--Complaint, answer, hearing and order.) (a) In case of failure to settle or adjust any such charge by conference and conciliation in accordance with Section 8 of this Act, the Commission shall cause to be issued and served upon such respondent a written complaint, under oath or affirmation, stating the charge of unfair employment practice substantially as

alleged in the charge theretofore filed with the Commission as hereinbefore provided in Section 8 of this Act and the relief sought on behalf of the person aggrieved and containing a notice of public hearing before a commissioner or a duly appointed hearing examiner at a place therein fixed, to be held not less than 30 nor more than 90 days after the service of such complaint. The place fixed shall be within 100 miles of the place where the unfair employment practice is alleged to have been committed.

Whenever such a charge of an unfair employment practice has been properly filed, the Commission, within 180 days thereof or within any extension of that 180 day period agreed to in writing by all parties and approved by a member of the Commission, shall either issue and serve a complaint in the manner and form set forth in this Section or shall order that no complaint be issued. Any such order shall be duly served upon both the complainant and the respondent.

***

858.01a. Actions -- Injunctions -- Limitations] §8.01a. In the case of any charge of an unfair employment practice which has been properly filed with the Commission prior to March 30, 1978, which has not been settled or adjusted by conference and conciliation under Section 8, and which within 180 days thereafter has not been the subject of a complaint issued by the Commission or an order that no complaint be issued, the person filing the charge may seek appropriate injunctive or other relief by filing an action in the circuit court of the county where the alleged unfair employment practice occurred, and if the person prevails in such action the court may award such person costs and reasonable attorneys' fees. The Commission shall notify all such persons by registered mail of their right to seek such relief and any such action must be initiated in the circuit court within 2 years of the receipt of such notice, notwithstanding any other statute of limitations imposed on such actions.
Added by P.A. 80-1455, §1, eff. Sept. 16, 1978.

***

860. §10. Review under Administrative Review Act.) Any complainant or respondent may apply for and obtain judicial review of an order of the Commission entered under this Act in accordance with the provisions of the "Administrative Review Act," approved May 8, 1945, as heretofore or hereafter amended; and the Commission in proceedings under this Section may obtain an order of Court for the enforcement of its order.

SEP 29 PAGE #4

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-6519

ORIGINAL COPY

NAHUM ZACKAI, Appellant,

v.

BOARD OF GOVERNORS OF STATE COLLEGES AND UNIVERSITIES FOR CHICAGO STATE UNIVERSITY, Appellee.

ON APPEAL FROM THE SUPREME COURT OF ILLINOIS

APPELLANT'S SUPPLEMENT TO HIS JURISDICTIONAL STATEMENT

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Dated: October 1, 1980

10

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

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NAHUM ZACKAI, Appellant,

v.

BOARD OF GOVERNORS OF STATE COLLEGES AND UNIVERSITIES FOR CHICAGO STATE UNIVERSITY, Appellee.

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APPELLANT'S SUPPLEMENT TO HIS JURISDICTIONAL STATEMENT

The appellant, Dr. Nahum Zackai, files this Supplemental Jurisdictional Statement in order to alert this Court to recent decisions by Illinois courts terminating rights of employment discrimination complainants under the Illinois Fair Employment Practices Act, Ill. Rev. Stat. ch. 48, §§851 et seq. (hereinafter "the FEP Act"). These decisions, both of which were filed within the last week, give even greater urgency to Dr. Zackai's request that this Court note probable jurisdiction of his appeal, because the new rulings will deprive him and thousands of other complainants of a cause of action under the FEP Act.

I. A RECENT ILLINOIS COURT ORDER WILL EFFECTIVELY BAR DR. ZACKAI'S CAUSE OF ACTION UNDER THE FEP ACT UNLESS THIS COURT REVERSES THE DECISION BELOW.

On September 24, 1980, an Illinois trial court ruled that Section 8.01a of the FEP Act is unconstitutional. The Illinois Legislature had enacted Section 8.01a (Ill.

Rev. Stat., ch. 48, §858.01a) to revive actions terminated by the decision of the Illinois Supreme Court in Springfield-Sangamon County Regional Plan Commission v. Fair Employment Practices Commission, 71 Ill.2d 61, 373 N.E.2d 1307 (1978). This enactment provides that individuals whose charges were filed with the Commission before March 30, 1978 and where a complaint was not issued within 180 days could file an action in circuit court to pursue their claims.

Now, the fears that Dr. Zackai expressed in his Jurisdictional Statement at 14, n.1, have been realized, and the cause of action promised by this statute has proved to be illusory. The Circuit Court of Kane County in Elouise Wilson v. All-Steel Inc., No. 80 CH 192 (Cir.Ct., 16th Cir. of Illinois, September 24, 1980), ruled that the Section 8.01a is unconstitutional on the grounds that it revives stale claims and violates equal protection and due process.

Unless this decision is reversed, Dr. Zackai and the 2000 other complainants in his position will retain no cause of action under the FEP Act. Through no fault of their own, they will have lost their statutory right forever. The termination of their claims violates equal protection and due process.

II. SUPREME COURT REVIEW OF THIS APPEAL IS IMPORTANT BECAUSE THE RIGHT OF PRESENT AND FUTURE COMPLAINANTS MAY BE LOST MERELY BECAUSE THE FAIR EMPLOYMENT PRACTICES COMMISSION HAS FAILED TO TAKE TIMELY ACTION ON THEIR CLAIMS.

On September 29, 1980, in an opinion attached hereto at Appendix p.2, the Illinois Supreme Court expanded its previous rulings terminating claims because of the failure of the Illinois Fair Employment Practices Commission

(hereinafter, "the Commission") to issue complaints during the 180 day statutory time limit. It now appears that the failure of the Commission to observe any statutory time limit -- not only the 180 day limit -- will result in termination of a complainant's rights before the Commission. In Zimmerman Brush Co. v. Illinois Fair Employment Practices Commission, ___ Ill.2d ___, ___ N.E.2d ___, Slip Opinion No. 53199 (September 29, 1980), the Illinois Supreme Court issued a writ of prohibition preventing the Commission from proceeding further with the charge of Laverne Logan. Mr. Logan, who, like Dr. Zackai, is handicapped, had filed a charge of employment discrimination. The Commission failed to convene a fact finding conference within 120 days of the filing of the charge, as the statute provides. Ill. Rev. Stat. ch. 48, §858(b) (1979). Although at the time Zimmerman Brush filed its petition for writ of prohibition, the statutory period within which the Commission must issue a complaint had not yet elapsed, the Illinois Supreme Court ruled that the Commission's failure to convene a timely fact finding conference deprived it of jurisdiction over the matter.

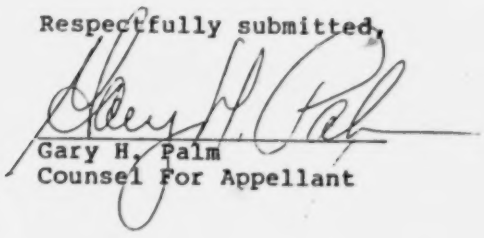
Like Dr. Zackai, Mr. Logan, through no fault of his own, has lost his rights to recover for employment discrimination under the FEP Act or at least to proceed to a hearing on the merits of his case. Zimmerman Brush broadens significantly the scope of prior Illinois decisions and further weakens the position of employment discrimination complainants. A procedural error or delay on the part of the Commission places a complainant's claim in peril, no matter how vigilant he has been in protecting his own rights.

This Court should determine whether the rights of those who have complained of discriminatory employment practices may be extinguished by the failure of the Commission to meet statutory time limits. The recent decisions in Illinois are further evidence that those rights are in jeopardy and that a growing number of the victims of discrimination may lose their rights granted by the FEP Act.

CONCLUSION

For these reasons, the appellant respectfully prays that this Court should note probable jurisdiction of this appeal.

Respectfully submitted,



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CIRCUIT COURT FOR THE 16TH JUDICIAL CIRCUIT

STATE OF ILLINOIS } SS.
COUNTY OF KANE }

GEN. NO. 80 CH 192

☐ JURY ☐ NON-JURY

Eloise Wilson	Department of Human Rights, Intervenor and All-Steel, Inc.
PLAINTIFF (S)	VS. DEFENDANT (S)

JUDGE Krause	COURT REPORTER	PLTF. ATTY.	CHECK IF PRESENT
DEPUTY CLERK	A copy of this order ☐ should be sent to: ☐ has been sent to:	DEFT. ATTY.	

ORDER

THIS CAUSE COMING ON TO BE HEARD ON DEFENDANT'S MOTION TO DISMISS, THE COURT OTHERWISE BEING ADVISED IN THE PREMISES, IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT THIS ACTION BE AND HEREBY IS DISMISSED WITH PREJUDICE FOR THE REASON THAT SECTION 8.01 OF THE ILLINOIS FAIR EMPLOYMENT PRACTICES ACT IS UNCONSTITUTIONAL FOR THE REASONS SUBMITTED IN DEFENDANT'S MOTION. THERE IS NO JUST REASON TO DELAY ENFORCEMENT OR APPEAL OF THIS ORDER.

65

OPINION

SUPREME COURT OF ILLINOIS

United States of America

State of Illinois } ss.
Supreme Court }

At a Term of the Supreme Court, *begun and held in Springfield, on Monday, the* eighth *day of* September *in the year of our Lord, one thousand nine hundred and* eighty *, within and for the State of Illinois.*

PRESENT: JOSEPH H. GOLDENHERSH, CHIEF JUSTICE

JUSTICE ROBERT C. UNDERWOOD — JUSTICE DANIEL P. WARD

JUSTICE HOWARD C. RYAN — JUSTICE WILLIAM G. CLARK

JUSTICE THOMAS J. MORAN — JUSTICE THOMAS E. KLUCZYNSKI

TYRONE C. FAHNER
[redacted] ATTORNEY GENERAL

LOUIE F. DEAN, MARSHAL

ATTEST: CLELL L. WOODS, CLERK

Be It Remembered, *that afterwards, to-wit, on the* 29th *day of* September *, 19* 80

the opinion of the Court was filed in said cause and entered of record in the words and figures following, to-wit:

Zimmerman Brush Company, an Illinois corporation,
Petitioner

No. 53199 vs.

The Illinois Fair Employment Practices Commission, a State Agency; et al., etc.,
Respondents

} Prohibition

CLELL L. WOODS
CLERK OF THE SUPREME COURT
STATE OF ILLINOIS

10 (10027—3M—12-78)

Docket No. 53199—Agenda 49—May 1980.

ZIMMERMAN BRUSH COMPANY, Petitioner, v. THE ILLINOIS FAIR EMPLOYMENT PRACTICES COMMISSION, Respondent.

MR. JUSTICE WARD delivered the opinion of the court:

On November 9, 1979, Laverne Logan was discharged from his employment at the Zimmerman Brush Company (company) in Chicago, on the ground that he was unable to perform his duties on an assembly line due to a physically handicapped left leg. On November 14, Logan filed a charge with the Illinois Fair Employment Practices Commission (Commission) claiming that he had been discriminated against because of his handicap. On January 30, 1980, the company was notified by the Commission to be present at a fact-finding conference set for March 18, 1980, in order to "define the issues, determine which facts are undisputed, obtain evidence, and ascertain whether there is a basis for a negotiated settlement of the charge." The company was also asked to complete a two-page questionnaire regarding the circumstances of Logan's discharge. The company answered the questionnaire and returned it on March 7.

On March 18 the company appeared for the sole purpose of moving to dismiss the charge on the ground that the conference was convened 125 days after Logan's charge was filed, which was beyond the 120-day period provided for in the Fair Employment Practices Act (Ill. Rev. Stat. 1979, ch. 48, par. 858(b)). Since the meeting was not held within the prescribed period, the company said the Commission lost jurisdiction and should dismiss the charge. Upon the oral denial of the motion and the hearing officer's statement that the conference was to proceed, the company refused to participate and left the meeting.

On March 20 the company moved in this court for leave to file a petition for writ of prohibition under Supreme Court Rule 381(a) (73 Ill. 2d R. 381(a)). On March 25 the motion was allowed, briefs were ordered, the proceeding before the Commission was stayed, and oral argument on whether the writ should be allowed was set for June 25. On April 30, Logan filed a second charge with the FEPC which was identical to the first. The Commission notified the company of its intention to proceed with the second charge and the company moved to stay

the second proceeding pending a decision on its petition for a writ of prohibition. We allowed the motion to stay.

The controversy here concerns the interpretation to be given section 8(b) of the Fair Employment Practices Act, which provides:

> "(b) Within 120 days of the proper filing of a charge, the Commission shall convene a fact finding conference (unless the charge has been withdrawn or dismissed) for the purposes of obtaining evidence, identifying issues in dispute, ascertaining the positions of the parties, and exploring the possibility of a negotiated settlement of the controversy. Notice of such conference shall be given to all parties at least 10 days prior thereto and a default order may be entered against any party who fails to attend such conference without good cause shown." Ill. Rev. Stat. 1979, ch. 48, par. 858(b).

The company contends that the legislature, in providing that the Commission "shall convene" a fact-finding conference within 120 days after a charge has been filed with the Commission, intended to make mandatory the convening of a fact-finding conference within this prescribed time period. It contends further that a failure by the Commission to do so would result in an automatic dismissal of the charge. The Commission's position is that the provision in section 8(b) for convening a conference is only directory and that one may be called beyond the 120-day period. The complainant Logan states that, even if "shall convene" is deemed here to be mandatory, the automatic dismissal of his charge should not be the consequence of the Commission's failure to convene the conference within the prescribed statutory period.

The use of "shall" in a statutory provision does not of itself require that the provision be held to be mandatory rather than directory. One must consider the word within the context of the entire statute, looking particularly to the purpose of the legislation. (See *Miller v. Department of Registration & Education* (1979), 75 Ill. 2d 76, 81; *In re Armour* (1974), 59 Ill. 2d 102, 104; *Carrigan v. Illinois Liquor Control Com.* (1960), 19 Ill. 2d 230, 233.) Applying this principle we judge that the legislative direction to convene a fact-finding conference within the 120-day period is a mandatory one.

Section 8(b) was approved and became effective in September of 1978 shortly after this court interpreted the existing section 8(c), which required that the FEPC decide

whether or not a complaint "shall" issue within 180 days after receipt of an employee's charge. In *Springfield-Sangamon County Regional Plan Com. v. Fair Employment Practices Com.* (1978), 71 Ill. 2d 61, this court analogized the 180-day period to a period of a statute of limitations and also noted the financial impact upon an employer who might be confronted by a complaint long after the alleged unfair employment practice. The court went on to hold that "the 180-day period prescribed in the statute was intended to ensure expeditious action on behalf of the FEPC, and must be considered mandatory." (71 Ill. 2d 61, 68.) It was also observed: "The respondents have the right to expect that the impact of such administrative orders will be minimized by compliance with the statutory time limitations." (71 Ill. 2d 61, 73.) Shortly thereafter in *Board of Governors v. Illinois Fair Employment Practices Com.* (1979), 78 Ill. 2d 143, 149, the decision in *Springfield-Sangamon* was upheld as being "clear and unequivocal," and this court issued a writ of prohibition against the Commission, which had filed a complaint more than two years after the expiration of the 180-day statutory period.

As stated, section 8(b), requiring that "the Commission shall convene a fact finding conference" within 120 days after receiving an unfair employment practices charge, was added to the Act by amendment eight months after the decision in *Springfield-Sangamon.* We consider that the legislature's use again of the term "shall" in section 8(b) indicates an intention that the prescription of a 120-day period be given a mandatory construction. This court has stated that where "previously construed terms in the unamended sections are used in the amendment, it is generally concluded that the legislature intended to adopt the prior construction given to these terms." (*Hupp v. Gray* (1978), 73 Ill. 2d 78, 86, citing 1A Sutherland, Statutes and Statutory Construction sec. 22.35 (4th ed. 1972).) Though the question here is not identical, the principle of construction is applicable especially where, as here, the term previously construed appears in a later amendment to the same section of the statute. It is a canon of construction that the General Assembly is presumed to know how the courts have interpreted a particular statute and to have acted thoroughly and conscientiously. (See, *e.g., People v. Manning* (1979), 76 Ill. 2d 235, 241. See also 2A Sutherland, Statutes and Statutory Construction sec. 57.05 (4th ed. 1973).) It is reasonable

to consider that under these circumstances the legislature intended to adopt the prior construction of "shall."

The Commission would have us hold that the legislative pronouncement is but directory. It argues that the financial impact upon the employer in *Springfield-Sangamon,* when confronted with the prospect of being liable for back pay and interest over an extended period of time, was far greater than whatever impact there might have been here by a delay of five days in scheduling a conference.

We deem that this contention that the conference should be allowed to proceed beyond the 120-day period interprets *Springfield-Sangamon* too narrowly and ignores the goals underlying section 8(b). The fact-finding conference is specifically designed "for the purposes of obtaining evidence, identifying issues in dispute, ascertaining the positions of the parties, and exploring the possibility of a negotiated settlement of the controversy." (Ill. Rev. Stat. 1979, ch. 48, par. 858(b).) Before the provision was added to the Act in 1978 there was no formal opportunity for expeditiously resolving a dispute. The only indication of whether it was deemed that the employee's charge was supported by "substantial evidence" (Ill. Rev. Stat. 1979, ch. 48, par. 858(c)) would be on or before the 180th day after the filing of the charge when the Commission's decision to issue a complaint against the employer or not to issue a complaint was announced.

Under section 8(b) the interests of both employee and employer can be served in that each is given an opportunity to discuss and possibly settle the dispute without formal action being taken against the employer by the Commission. Through a conference, unnecessary costs may be avoided and the Commission permitted to devote itself to other matters. Even if a settlement is not reached at this stage, the proceeding can be importantly valuable to the Commission in that the conference not only places the Commission in a better posture to decide whether to dismiss the employee's charge, it also aids the Commission in setting up a procedural framework for the conciliatory process which follows. (See Ill. Rev. Stat. 1979, ch. 48, par. 858(c).) The public interest in an expeditious resolution of disputes which is made possible though section 8(b) is not less important than the financial considerations discussed in *Springfield-Sangamon.* Avoiding unnecessary

expenditures of time and money by all parties serves to further the stated policy of the Act, which is not only to protect employees from unfair employment practices but also to protect "employers, labor organizations and employment agencies from unfounded charges of discrimination." Ill. Rev. Stat. 1979, ch. 48, par. 851.

That a default order may be entered against a party failing to attend the conference not only illustrates the importance the legislature attached to this stage of the proceedings but also it supports our view that the provision for the convening of a conference within 120 days is a mandatory one. In *Tuthill v. Rendelman* (1944), 387 Ill. 321, 350, the court cited *Clark v. Quick* (1941), 377 Ill. 424, 430, where it was said: "Where terms of the statutes are peremptory and exclusive, where no discretion is reposed or where penalties are provided for its violation, the provisions of the act must be regarded as mandatory."

We cannot adopt the employee's contention that the Commission's failure to convene a fact-finding conference should not result in the automatic dismissal of the action and that the Commission should be allowed to proceed without a conference having been held. To adopt this position would frustrate the purpose of attempting to facilitate just and expeditious resolutions of employment disputes. The fact-finding conference was clearly intended to be an integral and mandatory phase of the complaint process. Such conferences benefit the Commission, the employee and employer, and, of course, the public interest. Without a required fact-finding conference the Commission would in most instances have to proceed solely on the basis of the employee's charge. Unless the Commission would be able to obtain information regarding the charge from some independent investigation its decision of whether or not to file a complaint would hardly be an informed one.

The Commission and Logan also contend that the company waived its right to object to the Commission's decision to proceed with the conference on the 125th day and also is estopped from claiming that the Commission has lost jurisdiction over the dispute. The contention is founded upon the company's response to the Commission's questionnaire regarding the circumstances of the employee's discharge. The questionnaire was filed with the Commission on March 7, six days before the 120-day

period had expired and 11 days before the date on which the conference was actually convened on March 18.

The contention must be denied. The company simply complied with the Commission's direction or request in completing the questionnaire. Had it not done so, as the company points out, it would have been responsible for delaying the proceeding. Too, it is not shown that the company was aware that the 120-day period under section 8(b) would expire before the scheduled date of the conference. We do not find a basis for estoppel or waiver. See generally *Pantle v. Industrial Com.* (1975), 61 Ill. 2d 365; *Levin v. Civil Service Com.* (1972), 52 Ill. 2d 516; *Lowenberg v. Booth* (1928), 330 Ill. 548; *Town & Country Bank v. James M. Canfield Contracting Co.* (1977), 55 Ill. App. 3d 91.

We also are not persuaded by the employee's protests that his rights to due process and equal protection were violated. The statutory scheme here was to provide, through administrative and judicial channels, a means of relief from discriminatory employment practices. The legislature could establish reasonable procedures to be followed upon a charge, and the observance of them here did not violate his constitutional rights.

The employee makes two other arguments. He says that the question regarding his charge against the company has been mooted because he filed a second and identical charge against the company before the 180-day statutory period within which a charge must be filed had expired. This, he argues, allows the Commission to proceed as if the first charge had never been filed. He further contends that the second charge is governed by the Illinois Human Rights Act, which became effective on July 1, 1980. (Ill. Rev. Stat., 1979 Supp., ch. 68, par. 1–101 *et seq.*). Logan directs attention to section 7–102(C)(3), which he says makes the convening of a fact-finding conference discretionary with the Commission. That section provides:

> "Upon reasonable notice to the complainant and the respondent, the Department may conduct a fact-finding conference. The fact-finding conference shall be held within 120 days of the date on which a charge has been filed unless waived by the parties in writing 10 days before the 120 day period has expired." Ill. Rev. Stat., 1979 Supp., ch. 68, par. 7–102(C)(3).

The argument ignores the principle that a statute will be given prospective application unless there is a

clear expression of legislative intent that it is to be retroactively applied. (See, *e.g.*, *People ex rel. American Federation of State, County & Municipal Employees v. Walker* (1975), 61 Ill. 2d 112; *Vendo Co. v. Stoner* (1974), 58 Ill. 2d 289, *cert. denied* (1975), 420 U.S. 975, 43 L. Ed. 2d 655, 95 S. Ct. 1398; *Country Mutual Insurance Co. v. Knight* (1968), 40 Ill. 2d 423.) It is evident there is nothing in the above-quoted section to require or permit retroactive application.

Too, this controversy was not made moot by the employer's filing a second charge with the Commission. As the complainant interprets the Act, as long as the 180 days within which he may file a charge with the Commission under section 8(a) have not expired, he is entitled to file another charge. To be consistent, it would seem he would have to contend that this would be so regardless of the fact that the Commission had dismissed an earlier charge or, as in this case, had failed to convene a fact-finding conference within 120 days, which resulted in the dismissal of the charge. To allow such interpretation, however, obviously would frustrate the design of sections 8(a) and 8(b) and, in a case such as this one, would allow the Commission, despite its failure to comply within the Act, to proceed on an identical charge after the first charge had already expired or suffered dismissal. Not only would an employer's rights be prejudiced if an employee were allowed to file a second and successive charge, but also the public interest in promoting an expeditious resolution of charges would be circumvented.

For the reasons given, the petition for writ of prohibition is allowed.

Writ awarded.

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BOARD OF GOVERNORS OF STATE COLLEGES AND UNIVERSITIES FOR CHICAGO STATE UNIVERSITY, Appellee.

ON APPEAL FROM THE SUPREME COURT OF ILLINOIS

Motion To Dismiss

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Dated: May 28, 1980

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Hill v. California, 401 U.S. 797 (1970). 7

Labine v. Vincent, 401 U.S. 532 (1970) 8

Londoner v. Denver, 208 U.S. 409 (1908). 11

Louisville & Nashville Railroad Co. v. City of Louisville, 166 U.S. 709 (1897) 8

Michigan v. Tyler, 436 U.S. 499 (1978) 7

Mobile, Jackson and Kansas City Railroad Company v. State of Mississippi, 210 U.S. 18 (1908). 11

Pennsylvania Railraod Company v. Towers, 245 U.S. 6 (1917). 11

Rand v. Bossen, 27 Cal.2d 61, 162 P.2d 457 (1945). . . . 11

Republic Life Insurance Company v. Swigert, 135 Ill. 150, 25 N.E. 680 (1890) 7

Springfield-Sangamon County v. FEPC, 71 Ill.2d 61, 373 N.E.2d 1307 (1978). 7

United States v. Thirty-Seven (37) Photographs, 402 U.S. 363 (1971) 8

Utley v. City of St. Petersburg, Florida, 292 U.S. 106 (1934). 12

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-6519

NAHUM ZACKAI, Appellant,

v.

BOARD OF GOVERNORS OF STATE COLLEGES AND UNIVERSITIES FOR CHICAGO STATE UNIVERSITY, Appellee.

ON APPEAL FROM THE SUPREME COURT OF ILLINOIS

MOTION TO DISMISS

Appellee, pursuant to Rule 16(1)(b) of the Rules of the Supreme Court of the United States, moves the Court to dismiss the appeal herein on the following grounds:

1. Appellant has not complied with Rule 53 of the Supreme Court of the United States in filing his motion to proceed in forma pauperis.

2. The federal question sought to be reviewed was not timely raised by Appellant and was not passed upon by the Illinois Supreme Court.

3. Zackai's appeal does not involve a decision of the Illinois Supreme Court upholding the validity of a state statute challenged as being repugnant to the federal Constitution.

4. Zackai's appeal does not raise a substantial and important federal question.

Statement

On October 30, 1976, Appellant Nahum Zackai, hereinafter Zackai, filed a charge of unfair employment practice against Appellee, Board of Governors of State Colleges and Universities for Chicago State University, hereinafter BOG, with the Illinois Fair Employment Practices Commission. In his charge, Zackai alleged that BOG had discriminated against him by refusing to allow him to rescind a resignation letter he previously submitted. (BOG's Petition for Writ of Prohibition - Exhibit A.)

On June 22, 1978, the Illinois Fair Employment Practices Commission, hereinafter FEPC, filed a complaint of unfair employment practice against BOG. (BOG's Petition for Writ of Prohibition - Exhibit F.)

On June 27, 1978, BOG filed with FEPC Administrative Law Judge Patricia Patton a motion to dismiss FEPC's complaint asserting as grounds therefor that the FEPC lacked subject matter jurisdiction with respect to its complaint against BOG by reason of Section 8.01(a) of the Illinois Fair Employment Practices Act, hereinafter FEPA, which requires the FEPC to file a complaint based upon a complainant's charge or dismiss the charge within 180 days of the proper filing of the charge. (BOG's Petition for Writ of Prohibition - Exhibit G.)

On January 31, 1979, Administrative Law Judge Patricia Patton denied BOG's motion to dismiss; ordered BOG to file an answer within fifteen days; ordered a pre-hearing memorandum to be filed on or before April 30, 1979; and scheduled a public hearing for May 9 through May 11, 1979. (BOG's Petition for Writ of Prohibition - Exhibit H.)

On February 14, 1979, BOG filed with Administrative Law Judge Patton a motion for reconsideration; a motion for leave to appear and present oral argument; and a motion to have the jurisdictional questions raised by BOG certified to the FEPC. (BOG's Petition for Writ of Prohibition - Exhibit I.) Thereafter, Patton denied BOG's motion for oral argument; denied BOG's motion for reconsideration of her ruling with respect to timeliness of the complaint; denied BOG's motion for certification of the questions raised by BOG's motion to dismiss and motion for reconsideration; and allowed BOG to submit a memorandum of law in support of its contention that FEPC lacked jurisdiction in light of Zackai's filing of an action in the Illinois Court of Claims based upon similar theories to those asserted in his charge filed with the FEPC. (BOG's Petition for Writ of Prohibition - Exhibit J.)

On March 6, 1979, BOG filed "Points and Authorities" in support of the proposition that the Illinois Court of Claims had exclusive jurisdiction over Zackai's claim. (BOG's Petition for writ of Prohibition - Exhibit K.)

On March 13, 1979, Administrative Law Judge Patricia Patton entered an order denying BOG's motion to dismiss and ordered BOG to file an answer to FEPC's complaint. (BOG's Petition for Writ of Prohibition - Exhibit L.)

On April 6, 1979, BOG filed with the Supreme Court of the State of Illinois a motion for leave to file a petition for writ of prohibition and a motion for stay of the Zackai FEPC proceeding. The Illinois Supreme Court granted BOG's motions and stayed all proceedings before the FEPC.

On May 1, 1979, Zackai filed a motion to dismiss BOG's petition for writ of prohibition. In his motion, Zackai urged dismissal of BOG's petition on grounds that the filing requirement established by Section 8.01(a) of the FEPA was directory rather than mandatory; that BOG had failed to exhaust its remedies prior to filing its petition for writ of prohibition and that BOG had waived the filing requirement of Section 8.01(a) of the FEPA. Zackai did not in his motion claim in any fashion that Section 8.01(a) of the FEPA was constitutionally defective.

On May 12, 1979, BOG filed its objection to Zackai's motion to dismiss.

On June 15, 1979, BOG filed its brief in support of its petition for writ of prohibition.

On September 5, 1979, Zackai filed his "Brief and Argument" in opposition to BOG's petition for writ of prohibition. In his brief, Zackai suggested four issues for review but did not advance any claim that Section 8.01(a) of the Illinois FEPA was constitutionally defective.

On November 21, 1979, the Illinois Supreme Court entered its decision and ordered that a writ of prohibition be issued in favor of the BOG.

On December 12, 1979, Zackai filed with the Illinois Supreme Court a petition for rehearing relative to the Supreme Court's decision awarding the writ of prohibition. In said petition, Zackai suggests for the first time that Section 8.01(a) of the FEPA was repugnant to the Constitution of the United States and thus invalid. Specifically, Zackai argued that the Supreme Court "overlooked state and federal due process

implications" of the Court's holding that the 180-day filing requirement of Section 8.01(a) was mandatory.

On February 1, 1980, the Illinois Supreme Court denied Zackai's petition for rehearing without comment.

Questions Presented

1. Has Appellant complied with Rule 53 of the Supreme Court of the United States in filing his motion to proceed in forma pauperis?

2. Was the federal question which Appellant seeks to have this Court review timely raised by Appellant?

3. Does Zackai's appeal involve a decision in favor of the validity of a statute of the State of Illinois where a proper claim was made that the statute was repugnant to the Constitution of the United States?

4. Does Zackai's appeal raise a substantial and important federal question?

Argument

Appellee, Board of Governors of State Colleges and Universities, by its motion to dismiss presents four separate and alternative grounds for dismissal of Zackai's appeal. Arguments and case citations in support of each of Appellee's grounds for dismissal follow in separate discussion sections.

Appellant Has Not Complied With Rule 53 of the Supreme Court of the United States In Filing His Motion To Proceed In Forma Pauperis

In the case at bar, Appellant Zackai has filed an affidavit in support of his motion to proceed in forma pauperis.

In said affidavit, Zackai declares in a conclusory fashion that "because of my poverty, I am unable to pay the costs of said cause". Zackai's conclusory declaration is, however, not supported by facts. Thus, Zackai's affidavit does not comply with paragraph 1 of Rule 53 of the Supreme Court of the United States. Said paragraph requires that a party desiring to proceed in the Supreme Court in forma pauperis submit an affidavit setting forth facts which show that he comes within statutory requirements. See 28 U.S.C., Section 1915; Dryer v. Jalet , 349 F.Supp. 452 (1972). Accordingly, Zackai's motion to proceed in forma pauperis should be denied. Further, his appeal should be dismissed if he fails to file a proper affidavit in support of proceeding in forma pauperis, or fails to properly file and docket an appeal in the regular manner.

The Federal Question Sought To Be Reviewed Was Not Timely Raised By Appellant And Was Not Passed Upon By The Illinois Supreme Court

In his jurisdictional statement, Appellant Zackai urges the United States Supreme Court to grant him an appeal as a matter of right under 28 U.S.C., Section 1257(2) on the ground that the filing time limit prescribed by Section 8.01(a) of the Illinois FEPA violates the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution. However, for Zackai to be entitled to an appeal of right under 28 U.S.C., Section 1257(2) it was incumbent upon him to present his constitutional challenge to the validity of Section 8.01(a) of the FEPA to the Illinois Supreme Court in a proper and timely manner. This Zackai did

not do. Zackai totally failed to mention the existence of any constitutional issue in his motion to dismiss BOG's petition for writ of prohibition. Further, Zackai made no mention of constitutional infirmity with respect to Section 8.01(a) of the FEPA in written or oral arguments to the Illinois Supreme Court. It was not until after the Illinois Supreme Court entered a decision against him that Zackai belatedly advanced his constitutional claim in a petition for rehearing presented to the Illinois Supreme Court. This claim of constitutional invalidity of Section 8.01(a) of the Illinois FEPA comes too late. See for example Hanson v. Denckla, 357 U.S. 235 (1958). Clearly, Zackai had ample opportunity to raise any and all constitutional issues prior to the rehearing stage of the proceedings before the Illinois Supreme Court. Certainly, the Illinois Supreme Court's decision was not, or should not have been, unanticipated by Zackai in light of the Illinois Supreme Court's clear and unambiguous holding in Springfield-Sangamon County v. FEPC, 71 Ill.2d 61, 373 N.E.2d 1307 (1978). In other words, there was no excuse for Zackai not presenting his constitutional arguments with respect to the validity of Section 8.01(a) of the FEPA to the Illinois Supreme Court before that Court rendered its decision on November 21, 1979. Thus, the Illinois Supreme Court was not obligated to pass upon Zackai's constitutional claims and properly chose not to comment upon same in denying Zackai's petition for rehearing. See Republic Life Insurance Co. v. Swigert, 135 Ill. 150, 25 N.E. 680 (1890). Accordingly, Zackai is now foreclosed from having this Honorable Court review his belatedly asserted constitutional claims. See for example Michigan v. Tyler, 436 U.S. 499 - Footnote 7 (1978); Hill v. California, 401 U.S. 797 (1970).

Zackai's Appeal Does Not Involve A Decision Of The Illinois Supreme Court Upholding The Validity Of A State Statute Challenged As Being Repugnant To The Federal Constitution

In the case at bar Zackai argues in his jurisdictional statement that the Illinois Supreme Court incorrectly ruled that Section 8.01(a) of the Illinois FEPA was a mandatory filing requirement, noncompliance with which resulted in FEPC's loss of jurisdiction to proceed with respect to Zackai's charge of discrimination. Thus, it is quite clear that what Zackai is attempting to do through his appeal is to challenge the Illinois Supreme Court's construction of legislation promulgated by the Illinois General Assembly. This attempt should not be permitted to succeed as it is clearly established that the United States Supreme Court lacks jurisdiction to construe state legislation. United States v. Thirty-Seven (37) Photographs, 402 U.S. 363 (1971). Stated another way, appellate jurisdiction does not lie under 28 U.S.C., Section 1257(2) where the construction of a state statute rather than the constitutional validity of same is in issue. See Labine v. Vincent, 401 U.S. 532 (1970) and Louisville & Nashville Railroad Co. v. City of Louisville, 166 U.S. 709 (1897). Accordingly, this Honorable Court should dismiss Zackai's appeal.

Zackai's Appeal Does Not Raise A Substantial And Important Federal Question

Zackai claims in his jurisdictional statement that the United States Supreme Court should grant plenary review of his cause because of the substantial and important federal question he raises. Specifically, Zackai suggests that he has been denied rights guaranteed to him under the Fourteenth

Amendment to the United States Constitution by the Illinois Supreme Court's decision in Board of Governors v. FEPC, et al., 78 Ill.2d 143, 399 N.E.2d 590 (1979), and by his loss of employment in the BOG system. Zackai's suggestion of a substantial and important federal question is, however, unfounded. In this regard, the following matters are of particular note:

(1) Zackai's claim that the Illinois Supreme Court's decision has the resulting effect of denying him his day in court on the merits of his discrimination charge is false and misleading. Zackai has, from the date of his separation from the Board of Governors system, had a choice of forums available for advancing his discrimination claim. These forums included the Illinois Court of Claims. And, on June 15, 1978, Zackai did in fact file a complaint with the Illinois Court of Claims seeking monetary damages. That action is presently pending. Appendix, pages 1-5. Further, Zackai as well as other complainants whose charges were not timely processed by the Illinois FEPC, theoretically may pursue their discrimination cases under Public Act 80-1455 promulgated by the Illinois General Assembly on September 16, 1978. See Illinois Revised Statutes, 1979, Chapter 48, para. 858.01(a).

(2) Contrary to the assertion at page 24 of Zackai's jurisdictional statement, Zackai has no protectable property interest in continued employment in the Board of Governors of State Colleges and Universities system. Zackai submitted a letter of resignation on

May 12, 1976, which was accepted by CSU Vice President Allen DeGiulio on May 18, 1976. (BOG Petition for Writ of Prohibition - Exhibit C.) This transaction extinguished any claim to a property interest in continued employment which Zackai might previously have enjoyed. Gras v. Clark, 46 Ill.App.3d 803, 361 N.E.2d 316 (1977).

(3) Zackai's claim of a property interest in continued employment protected by the Fourteenth Amendment to the United States Constitution was not and could not have been presented to the Illinois FEPC as that administrative agency deals only with alleged violations of the Illinois Fair Employment Practices Act. Thus, any issue of whether or not Zackai had a protectable property interest in continued employment is not properly before this Court.

(4) Zackai has no claim that he was denied due process by the Illinois Supreme Court. The issues before the Illinois Supreme Court were clearly raised by BOG's petition for writ of prohibition and Zackai fully participated in the proceedings before the Illinois Supreme Court. Thus, Zackai had full opportunity to present his arguments relative to the proper construction to be given Section 8.01(a) of the FEPA and its impact upon himself and other complainants. Notwithstanding this opportunity, Zackai made no claim of constitutional infirmity with respect to Section 8.01(a) of the FEPA until the rehearing stage of the Supreme Court proceeding.

(5) Zackai's claim that he has a constitutional right to have the Illinois FEPC decide his case on the merits is totally unfounded under the facts and case

law related to this case. Quite to the contrary, pertinent facts and case law suggest that:

(a) Zackai has no claim that he was deprived of any right by the statute of limitations established by the Illinois General Assembly, as construed by the Supreme Court of Illinois. It has been consistently held that the establishment of a statute of limitations is a permissible exercise of state authority. Rand v. Bossen, 27 Cal.2d 61, 162 P.2d 457 (1945). And, equal protection of the laws is not violated by a state in establishing a statute of limitations. Chase Security Corp. v. Donaldson, 325 U.S. 304 - Footnote 5 (1945).

(b) Zackai has no claim that the Illinois FEPC was required to reach a determination with respect to his charge. A state has the absolute right to determine the extent of authority of its administrative agencies. Mobile Jackson & Kansas City Railroad Co. v. State of Mississippi, 210 U.S. 18 (1908). Further, the state has a clear right to establish preconditions to an administrative agency's or court's assumption of jurisdiction. Londoner v. Denver, 208 U.S. 409 (1908) and Pennsylvania Railroad Co. v. Towers, 245 U.S. 6 (1917).

(6) Zackai's claim that the policy of Illinois regarding jurisdictional time limits is harsh and unfair

to himself and other complainants is insufficient to raise a federal question. It is not the province of the United States Supreme Court to consider the wisdom of a state's policy as manifested in its legislation. California State Auto Association International Ins. Bureau v. Maloney, 341 U.S. 105 (1951). Further, defects in state administrative remedies or procedures do not necessarily present a substantial federal question under the due process clause. Utley v. City of St. Petersburg, Florida, 292 U.S. 106 (1934).

In that Appellant's claim of a substantial and important federal question is unsupported by the facts and case law related to this case, it must be rejected. This Court should thus summarily dismiss Zackai's appeal for want of a substantial and important federal question.

Conclusion

For all of the foregoing reasons, Appellee moves that this appeal be dismissed.

Respectfully submitted,

BOARD OF GOVERNORS OF STATE COLLEGES AND UNIVERSITIES

By Richard T. Dunn
Richard T. Dunn

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FILED
COURT OF CLAIMS
JUN 1 5 19..
ALAN J. DIXON
Secretary of State and
Ex-Officio Clerk Court of Claims

IN THE COURT OF CLAIMS OF THE STATE OF ILLINOIS

NAHUM ZACKAI,

Claimant,

v.

CHICAGO STATE UNIVERSITY, and THE BOARD OF GOVERNORS OF STATE COLLEGES AND UNIVERSITIES OF THE STATE OF ILLINOIS,

Respondents.

CLAIM 78-CC-1049

Amount Claimed: $92,580.54

FILED IN THE COURT OF CLAIMS
CLERK'S OFFICE

COMPLAINT

Nature of Claim

1. This is a claim for damages for discriminatory employment practices under the Illinois Equal Opportunities for the Handicapped Act, Ill. Rev. Stat., ch. 38 §§65-21 through 65-31, brought here pursuant to the Court of Claims Act, Ill. Rev. Stat., ch. 37 §§439.1 et. seq.

Parties

2. Claimant Nahum Zackai, is a resident of the State of Illinois, County of Cook. At all times relevant to this Complaint, through and including June, 1976, Claimant was a tenured professor at Defendant Chicago State University.

3. Respondent, Chicago State University, is an institution of higher education located in Chicago, Illinois and established as an agency of the State of Illinois under Ill. Rev. Stat., ch. 144 §1101.

4. Respondent, The Board of Governors of State Colleges and Universities (hereinafter "Board of Governors") is an agency of the State of Illinois created by Ill. Rev. Stat., ch. 144 §1001, et. seq.

5. Respondent Board of Governors is responsible for the operation, management and control of Respondent Chicago State University pursuant to Ill. Rev. Stat., ch. 144 §§1001 and 1103.

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6. The Court of Claims has jurisdiction of this claim pursuant to Ill. Rev. Stat., ch. 144 §1007 and Ill. Rev. Stat., ch. 37 §§439.1 et. seq.

7. At all times mentioned herein, Allan DeGiulio was the Vice-President for Academic Affairs of Chicago State University and the authorized agent of the Respondents, and each of them, and the actions and omissions of Allan DeGiulio herein alleged were done pursuant to said agency and within the authorized scope of said agency.

Cause of Action

8. In May, 1976, Claimant suffered a hemorrhage behind his eyes and, as a result thereof, Claimant's eyesight was permanently damaged and Claimant was thereafter continuously physically handicapped.

9. On or about May 12, 1976, Claimant wrote to Dr. Allen DeGiulio and requested that Claimant be permitted to take an early retirement effective June 30, 1976. A true copy of that letter is attached hereto as Exhibit A.

10. On or about June 17, 1976, Claimant in writing withdrew his May 12th retirement request by letter mailed to Allan DeGiulio. A true copy of this letter is attached hereto and made a part hereof and marked Exhibit B.

11. On or about June 29, 1976, Allan DeGiulio notified Claimant that the Respondents refused to permit Claimant to withdraw his retirement request. In a letter to Claimant, DeGiulio stated that it was "not possible for the University to revoke its acceptance of (Dr. Zackai's) notice of retirement at this late date." A true copy of this letter is attached hereto and made a part hereof and marked Exhibit C.

12. On or about July 29, 1976, Respondent Board of Governors forced Claimant to retire and refused to permit Claimant to withdraw his request for early retirement.

13. The Respondents and each of them discriminated against Claimant because of his physical handicap in violation of Ill. Rev. Stat., ch. 38 §65-23 by refusing to permit Claimant to withdraw his request for early retirement and by refusing to consider Claimant for reinstatement and by refusing to rehire or reinstate Claimant.

14. The above described actions of the Respondents and each of them constitute an unlawful employment practice in violation of Ill. Rev. Stat., ch. 38, §§65-23, 65-29.

15. As a direct and proximate result of the above described actions of the Respondents, and each of them, Claimant has been damaged in that Claimant has been unemployed and unable to earn his full salary all to his damage in the amount of Forty-two Thousand Five Hundred and Eighty and fifty-four/100 ($42,580.54) Dollars.

16. As a direct and proximate result of the action of the Respondents and each of them as described above, Claimant has been humiliated, has lost self respect, and has otherwise suffered great mental pain and anguish all to his damage in the additional amount of Fifty Thousand and no/100 ($50,000.00) Dollars.

Previous Claims of Discrimination

17. On or about November 30, 1976, Claimant filed a charge with the Fair Employment Practice Commission of Illinois claiming that Chicago State University had discriminated against him because of his physical handicap, blindness, in violation of the Illinois Fair Employment Practices Act, Ill. Rev. Stat., ch. 48 §§851 et. seq. On or about April 12, 1978, the Illinois Fair Employment Practice Commission found substantial evidence that Respondent Chicago State University had discriminated against Claimant in violation of the Illinois Fair Employment Practices Act. At the time of the filing of this complaint, Claimant's Fair Employment Practices Commission charge is pending in conciliation.

Other Procedural Allegations

18. Claimant at all times relevant hereto was, and he still is, the only owner of the claim set forth herein and no assignment transfer or other disposition of this claim has been made by Claimant or anyone on his behalf.

19. Claimant is justly entitled to the amount of money hereinbefore set forth from Respondents Chicago State University and the Board of Governors.

20. Claimant has not presented this claim or any other claim arising out of this occurrence to any other tribunal except as hereinbefore set forth.

WHEREFORE, Claimant respectfully requests that he be awarded the sum of Ninety-Two Thousand Five Hundred and Eighty and fifty-four/100 ($92,580.54) Dollars and be immediately reinstated as a full professor at Respondent Chicago State University with all seniority and benefits he would have received had he been continuously employed.

_____
Claimant

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

Nahum Zackai being duly sworn, upon oath deposes and says that he is the same person who signed the foregoing complaint, that he knows the contents thereof, and that the facts therein set forth are true.

_____
Claimant

Street _____
City, State _____
Zip Code _____ Phone _____

Subscribed and Sworn to
before me this ____ day
of June, 1978.

_____
Notary Public

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

Ronald W. Staudt, being first duly sworn, deposes and states that he read the foregoing complaint and verification to Nahum Zackai word for word and that Nahum Zackai thereafter signed the complaint and verification on the 14th day of June, 1978.

Ronald W. Staudt

Subscribed and Sworn to
before me this 14th day
of June, 1978.

Notary Public

Randolph N. Stone
Attorney for Claimant
Mandel Legal Aid Clinic
6020 South University Avenue
Chicago, Illinois 60637
Telephone: (312) 324-5181

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1979

No._____

NAHUM ZACKAI, Appellant,

v.

BOARD OF GOVERNORS OF STATE COLLEGES AND UNIVERSITIES
FOR CHICAGO STATE UNIVERSITY, Appellee.

ON APPEAL FROM THE SUPREME COURT OF ILLINOIS

AFFIDAVIT

I, Kathryn McCary, being first duly sworn according to law, depose and say that:

1. I have no interest in the above-entitled case.
2. On this day, I read to Nahum Zackai his attached affidavit.
3. He stated that each and every paragraph was true.

Further affiant sayeth not.

Kathryn McCary

Subscribed and Sworn to
before me this 30th day
of April, 1980.

Notary Public